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REED DICKERSON'S ORIGINALISM — WHAT IT CONTRIBUTES TO CONTEMPORARY CONSTITUTIONAL DEBATE

Thomas B. McAfee*

I. INTRODUCTION

I am pleased and honored to offer my personal gratitude for the work of Reed Dickerson, along with some thoughts on his important contributions to our understanding of the interpretive process. As a young scholar in need of help in grappling with the continuing debate over constitutional interpretation, I turned, at the suggestion of colleagues, to Reed Dickerson's impressive book on statutory interpretation.¹ The hours spent attempting to ingest Reed's thoughtful work were amply rewarded, and several years ago I took the occasion of publishing an article on the original intent debate to refer in an initial footnote to my intellectual debt to Reed's work and the illumination it had provided me on the nature of legal interpretation in general.² This occasion provides me with the opportunity to expand on the reasons for my own conviction that serious constitutional thinkers should become well-acquainted with his work.

The relevance of Professor Dickerson's work was appreciated by others as well. Indeed, at the encouragement of one of his colleagues at Indiana, in 1987 Reed set forth his own views of the ways in which his work on statutory interpretation might shed light on the problems of constitutional interpretation and application, notwithstanding his

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1. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975).

2. Thomas B. McAfee, *Constitutional Interpretation — The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 275 n.* (1986) [hereinafter McAfee, *Constitutional Interpretation*]. That initial tribute reflected not only Professor Dickerson's contribution to the thinking that went into that article, but also the extent to which his work had informed a good deal of the thinking in an earlier article that was in essence a preliminary treatment of the nature of constitutional interpretation. See Thomas B. McAfee, *Berger v. The Supreme Court — The Implications of His Exceptions Clause Odyssey*, 9 U. DAYTON L. REV. 219 (1984) [hereinafter McAfee, *Berger v. The Supreme Court*]; *id.* at 243-44, 258 n.242, 270 & n.315 (developing insights relying on Professor Dickerson's work).

claim of a "general ignorance of constitutional law."³ Dickerson's treatment of the relevance of his work to thinking about constitutional interpretation simply confirmed my own conviction that his work has much to offer all of us.

Apart from the modesty reflected in Professor Dickerson's disclaimer of expertise in the constitutional field, it points to one of the reasons I believe constitutional thinkers would do well to listen to him as a "witness" in considering the verdict they will reach about originalism as a theory of constitutional (or statutory) interpretation. As Patrick Kelley so ably describes him, Reed Dickerson was a legislative draftsman who turned attention to the problem of interpretation as a natural outgrowth of that work.⁴ He had at once the intensely practical mind of a craftsman who had toiled with real problems of drafting and interpretation as well as the mind of the theorist who was interested in the nature of his craft. He brings to the discussion of constitutional interpretation the attitude of objective observer, a real friend of the court.

Moreover, Reed Dickerson approached the problem as one of understanding and explicating the assumptions that have long been understood as implicit in our legal order. His interest in the subject of interpreting legal documents long predates the intense debate of the last two or three decades over the proper agenda for the Supreme Court.⁵ He therefore confronted the underlying questions without being dominated by a substantive agenda, whether based on human rights or conservative politics. He was as objective as any commentator during this time was likely to be.⁶

3. Reed Dickerson, *Statutes and Constitutions in an Age of Common Law*, 48 U. PITT. L. REV. 773 (1987).

4. Patrick J. Kelley, *Advice from the Consummate Draftsman: Reed Dickerson on Statutory Construction*, 16 S. ILL. U. L.J. 591 (1992).

5. In fact, so far as I am aware Reed Dickerson only made one brief (rather technical) comment in which he used the term "originalist" in his published writings, as that terminology was fashioned in the context of recent debate over constitutional interpretation. Dickerson, *supra* note 3, at 775 n.2. The title of this tribute to his work is admittedly intended to attract those interested in that recent debate to his work.

6. Indeed, I think it is fair to say that the central commitment I have discerned in Professor Dickerson's work is his commitment to a philosophy of originalist interpretation. For the uninitiated, originalism is the view that seeks the original meaning of a statute or constitution by examining the text in its original context; it is to be contrasted with any approach that orients the interpreter to the discovery of what the text might or should mean within an interpretive community at the time that it is being interpreted or applied. Some further distinctions and nuances will be developed in the course of this article.

These points will be illustrated in what follows, all of which will attempt to highlight some of the ways in which the work of Reed Dickerson contributes to the ongoing dialogue over the subject of constitutional interpretation. In Part II, which follows, Professor Dickerson's foundational principles are set forth. The task of courts in construing statutes is to honor legislative supremacy by giving effect to the decisions which the legislature embodies in the authoritative text of a duly-enacted statute. While some question whether the constitutional analogues of these principles apply to the task of decision-making under the Constitution, the major areas of dispute have centered on the implications of these principles for construing the Constitution. Parts III-V address the insights which Professor Dickerson's work offers us as we struggle with these disputes.

Part III addresses the tension many perceive between the acknowledged authority of the Constitution's adopters to establish the principles by which the nation will be governed and our commitment to the authoritative text they adopted. As shown in Part III-A, many pose a distinction between "textualism" and "intentionalism," in which we are required to choose whether our commitment is to the adopters' policy choices or merely their words. Professor Dickerson's work, however, constructs a harmonizing view that enjoins interpreters to discover the originally intended meaning of the text, by reading the text in a relevant social and historical context. We seek, in short, the policies and principles which the adopters intended and which were embodied in the text of the Constitution.

In Part III-B, in turn, these insights are applied to the historical question of whether the founding generation held to a "textualist" or an "intentionalist" view of constitutional interpretation. It has been suggested that the common law approach to statutory interpretation, which all agree informed early understandings of constitutional construction, was basically a textualist canon that eschewed reliance on extrinsic evidence that would show the intentions of the framers. Dickerson's basic insight, as developed in Part III-B-1, is that the common law rule, which prohibited resort to "legislative history," is properly viewed as addressing the issue of the appropriate and relevant sources for discovering the original intentions rather than as rejecting the idea that interpreters seek the intentions of the framers and adopters of the constitutional instrument. In Part III-B-2, Dickerson's insights are explored through an examination of two leading opinions of Chief Justice John Marshall, to the end of showing that Justice Marshall is not fairly characterized as a textualist who was not concerned with the

intentions of the framers and adopters of the Constitution.

Once the debate over reliance on "legislative history" is understood as a debate within originalist methodology about the most reliable means for determining the authoritative intentions of the Constitution's adopters, it becomes meaningful to address the merits of that debate. This is the burden of Part IV. In Part IV-A, the grounds for concern about reliance on internal legislative history, which prompted Dickerson to join those who oppose its use, are set forth. These concerns are illustrated through examples from the work of Raoul Berger. Part IV-B, however, attempts to set forth the uses of legislative history that seem likely to contribute meaningfully to the discovery of originally intended meaning without leading to the abuses to which legislative materials are so easily bent. Indeed, it will be argued that when legislative history materials are used as evidence of the occasion for the enactment, and as confirming evidence of the intentions of the framers in employing the language to be construed, their use seems consistent with the basic interpretive scheme set forth by Professor Dickerson.

Part IV-C attempts to support the claims made on behalf of appropriate reliance on the constitutional equivalent of legislative history. In particular, it relies on the powerful evidence from "legislative history" to supply a critique of the textualist arguments that have been offered against the original determination that the generally worded provisions of the Bill of Rights did not apply as limitations on the powers of the state governments. The conclusion reached is that a contextual "plain meaning" interpretation leads to error, and that the materials created during the process of adopting constitutional provisions can contribute powerfully to avoiding the pitfalls of literalism and of historical ignorance or error.

Finally, Part V suggests that the debate over "intentionalism" and reliance on legislative history should not be confused with the issue as to whether the language of the Constitution should be construed in accordance with the meaning attached to it at the time of its adoption or in accordance with the understanding and purposes which a decision-maker might attribute to such a text at the time when it is construed. It is here that the common law, the founding generation, and the thoughtful exposition of Reed Dickerson most clearly converge: the purpose of constitutional interpretation is to discover the original meaning of the text.

II. SOME STARTING POINTS — TEXT AND AUTHORITY

Dickerson's works begin the project of statutory interpretation with the assumptions of legislative supremacy and the exclusiveness of

the statute as the vehicle for communicating legislative will.⁷ In turn, legislatures are presumed to act in reliance on the principles that make ordinary communication possible and successful.⁸ The equivalents of these starting points in constitutional interpretation would be the assumptions of popular sovereignty (and hence the status of the federal Constitution as the supreme law of the land),⁹ and the written Constitution as the exclusive vehicle for communicating the will of the people who adopted the Constitution or one of its Amendments.¹⁰ There is every reason to think that, if these are the appropriate starting points for statutory interpretation, they would carry over to the task of interpreting the Constitution.

For Dickerson, of course, the orientation toward legislative supremacy and the enacted statute were taken as constitutional presuppositions for the task of statutory interpretation. He may even have been surprised to know that neither assumption is taken as a given in modern constitutional theory, and at least some commentators would question both constitutional equivalents. According to one view, for example, the founding generation understood constitutions to be comprised not only of the will of the people embodied in a written instrument, but even more centrally of fundamental law encompassing natural rights that individuals brought with them to the social contract.¹¹ Others have contended, somewhat less drastically, that not-

7. DICKERSON, *supra* note 1, at 7-10.

8. *Id.* at 10-11. For a useful explication of the model of ordinarily successful communication, see Kelley, *supra* note 4, at 593.

9. As Alexander Hamilton stated the orthodox view, under the Constitution all government officials are "deputies," and therefore any acts "contrary to the tenor of the commission" granted are void; otherwise, "the servant is above his master," and "the representatives of the people are superior to the people themselves." THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob Cooke ed., 1961). For the centrality of popular sovereignty to the founders, see Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267, 275-76 (1992).

Dickerson appropriately acknowledges that while popular sovereignty provides the official explanation and justification of our constitutional order, that order's "ultimate claim to legitimacy is its initial capacity to command acceptance from its constituency." Dickerson, *supra* note 3, at 777. Whereas the authority of the Constitution stands behind the legislature that enacts statutes, it is the acceptance of the Constitution by our political and legal culture that gives it practical authority. In any event, our established practice recognizes the authority of the Constitution and the principle that it is established and amended by the people.

10. Indeed, historically it was the written Constitution that supplied the key to justifying the practice of judicial review in the classic defense offered by Justice John Marshall. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

11. The historical theory that appears most clearly to assume that both popular sovereignty and the written instrument were less central than bedrock, unwritten fundamental law is Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). Sherry concludes

withstanding the primacy of popular sovereignty, the founders contemplated that an unwritten constitution of human rights would generate implicit limitations on government to the extent that any such rights were not clearly rejected in the text of the Constitution.¹² Furthermore, quite apart from these historically-based arguments, a number of commentators have contended that the decision-makers who bequeathed us the Constitution lack the moral authority to bind us today — with the implication that our constitutionalism must be based on a search for what is fundamental for us rather than for the decisions they sought to embody in the text of the original Constitution.¹³

Even so, a significant number of constitutional thinkers would not have difficulty embracing Professor Dickerson's two principles, even if the principles would not take everyone to precisely the same conclusions about how we should conduct the enterprise of constitutional interpretation.¹⁴ Many would agree that the task of interpreters

that the founding generation viewed natural rights as inherent limitations on powers granted to government. The rights stated in the founding era's state constitution's were thus "declared" rather than "enacted," and they therefore were viewed as being immutable and thus not subject to constitutional amendment. *Id.* at 1133-34, 1146, 1160, 1165-66.

With respect to the Federal Constitution, Sherry is unequivocal that the people's rights were thought of as inherent and that the founders believed that courts could enforce natural rights beyond any limitations found in constitutional text. Even so, although the apparent inference that the natural rights would override even the sovereignty of the people seems to flow from her premises and arguments, the point is not so clearly articulated as to the Federal Constitution; indeed, at one point she asserts that the founding generation did not perceive the tension between natural law and popular sovereignty that we perceive today. *Id.* at 1156 n.32. For a defense of "constitutional" judicial review based on a pure natural law jurisprudence, based only loosely on historical argument, see Mortimer Adler, *Robert Bork: The Lessons to be Learned*, 84 Nw. U. L. REV. 1121, 1124 (1990) (arguing that Judge Bork should have been rejected for his positivism alone because it precluded him from judging correctly in the "cases that come before the Supreme Court in which it is not *unconstitutionality*, but *injustice*—the violation of human rights and liberties—that calls for rectification and redress"). To the extent that human rights are at stake, Professor Dickerson's approach to interpreting legal texts obviously has little to offer the proponent of views such as these.

12. *E.g.*, Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 67 (Neil C. York ed., 1988).

13. Perhaps the best known formulation of this view is found in Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). *See also* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1499-1500 (1985) (challenging moral authority of the clique of "propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today who hold conceptions of our interests and selves very different from [theirs]."); CRAIG R. DUCAT, *MODES OF CONSTITUTIONAL INTERPRETATION* 103 (1978) (observing that "the framers, after all, are dead, and in the contemporary world, their views are neither relevant nor morally binding").

14. *See, e.g.*, LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 14,

is to honor the authority of the Constitution, as reflecting the will of the sovereign people, by seeking to understand what is communicated by the constitutional text. The areas of disagreement will be taken up in subsections which follow.

Before turning to the areas of contention, it is worth noting that Professor Dickerson's work supplies us with another preliminary observation of significance to modern constitutional debate. He noticed that many modern lawyers and judges rely on "case law to support so-called rules for determining meaning, a practice that differs little from relying on case law to validate the law of gravity."¹⁵ Similarly, he criticized "so-called 'statutory construction' acts, which presume to regulate, among other things, the principles for extracting meaning."¹⁶ Professor Dickerson understood that legal interpretation required a grasping of the elements of communication; whatever authority is held by popular legislatures, or the sovereign people who empower them, that authority does not include the power to override basic principles of communication and thus to dictate the process of interpretation.

These observations seem relevant to some recent debate about the "interpretive intent" of the founders. On the one hand, Raoul Berger has written as though evidence that the founding generation contemplated that interpreters would resort to the constitutional equivalent of legislative history to discover the original intent of the framers should be viewed as binding on modern interpreters.¹⁷ At the same time, his critics have pointed to historical evidence that the founders opposed reliance on extrinsic evidence; they then contend that true originalists would feel bound by this "interpretive intent."¹⁸ Dicker-

17 (1991) (emphasizing fidelity to constitutional text and need to maintain line between determining what Constitution says and what the interpreter wishes it *would* say); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 113 (1989) (asserting that "no one should wish to defend a non-text-based view of constitutional law").

15. Dickerson, *supra* note 3, at 779.

16. *Id.*

17. *E.g.*, Raoul Berger, *Robert Bork's Contribution to Original Intention*, 84 Nw. U. L. REV. 1167, 1170-73 (1990).

18. *E.g.*, Hans W. Baade, "Original Intent" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1004 (1991) (contending that current Senate would not expect a hypothetical flag-burning amendment to be construed by an originalist canon of interpretation in light of its clear rejection of originalism in the Bork hearings; by analogy, if founders rejected such a canon, originalist position would be indefensible in historical terms); *id.* at 1007 (arguing that it is essential to the argument of Raoul Berger and other "subjective intent" theorists to show "that this was also the common-law rule of statutory interpretation at the time of the adoption of the Constitution"); *id.* at 1024 n.149 (observing that Berger's work on the Fourteenth Amendment "correctly focused on (but then inexplicably neglected) canons of interpretation then prevailing in the United States at the time of the adoption of the Fourteenth Amendment"); Robert W.

son's analysis points us toward the conclusion that the principles of communication that properly govern extracting meaning from an enacted text are not the sort of thing to be legislated, let alone constitutionalized.¹⁹

Professor Dickerson's assessment makes sense both as theory and in textual and historical terms. The Constitution itself does not purport to speak to the question as to precisely how it is to be interpreted. Beyond declaring itself to be the supreme law of the land, the Constitution contains not a hint as to how courts should go about the interpretive process. Although courts in the common law tradition have frequently treated the common law methods as rules of law, Professor Dickerson's careful evaluation of various common law devices, from the canons of interpretation to the plain meaning rule, confirms what we all know — these devices are better viewed as tools for analysis than rules set in concrete.²⁰ There is every reason to think that the founders would have seen the law of interpretation as governed by general principles that might be better understood over time.²¹ The

Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 446 n.4 (1984) (observing that originalists "tend to ignore those aspects of the constitutional framers' states of mind that had to do with the way the language they were enacting would be interpreted"); Brest, *supra* note 13, at 215-16 (observing that disparity between framers' substantive intent and "interpretive" intent "poses obvious difficulties for an intentionalist whose very enterprise is premised on fidelity to the original understanding"); *id.* at 227 n.87 (acknowledging that if originalism is defended as the best means to "serve the ends of constitutionalism," rather than in terms of what the framers expected, originalists may not be caught in a bind of inconsistency).

19. Indeed, it seems equally clear to me that the broader modern debate as to whether we are (or should be) bound by the original meaning of the Constitution will necessarily be decided on the basis of political and constitutional theory rather than by reference to the constitutional understanding of the founders. I am inclined to side with those who argue that it is insufficient for either side of the current debate to contend that the "interpretive intent" of the framers governs the debate, whether the argument is advanced by originalists or nonoriginalists. Richard S. Kay, *The Bork Nomination and the Definition of "The Constitution,"* 84 NW. U. L. REV. 1190, 1197-98 (1990); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 690-91 (1991); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 691 (1987). On the other hand, it also seems reasonable to give careful consideration to the founders' views of the nature of constitutionalism.

20. See DICKERSON, *supra* note 1, at 227-37 (analyzing merits and demerits of the various canons). No one would suggest that we treat the canons of construction precisely as would the founders; I assume, however, that this fact does not vitiate our commitment to using whatever skills we can obtain to discern the meaning of the text.

21. Professor Powell documents the claims of early interpreters who insisted that their methods involved "simple inferences from the obvious operation of things." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985) (quoting 1 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 255 (John Jay) (Jonathan Elliot ed. 1827); see *id.* at 907 (quoting John Steele's statement that interpretation would take place in accord with "universal jurisprudence").

real questions concern the implications in practice of Dickerson's starting principles.

III. TEXT AND AUTHORITY REVISITED — THE PROBLEM OF TEXT AND CONTEXT

A. The Supposed Tension Between Legislative Intent and the Authoritative Text

It has frequently been suggested that there is an important tension between the first and second of Dickerson's guiding assumptions. The doctrine of legislative supremacy has often led law writers to suggest that the purpose of statutory interpretation is to implement the will of the policy-making branch by construing the statute according to the intent of the law-maker.²² The constitutional analogue is to require interpreters to implement the will of the sovereign people as expressed through their written constitution.²³

On the other hand, it is often argued that legislatures possess only a very limited sort of supremacy, inasmuch as they speak to us only through the legislative instrument and their task is completed when the statute is enacted.²⁴ On the same logic, it has been argued that only the text of the Constitution was ratified, and that the text as such possesses a unique authority that exists in complete independence of any intentional decision regarding it.²⁵ What is frequently posited is an absolute conflict between "textualist" and "intentional-

22. *E.g.*, DICKERSON, *supra* note 1, at 8; James M. Landis, *A Note on "Statutory Construction,"* 43 HARV. L. REV. 886, 893 (1930). As suggested by the title of his oft-cited article, Professor Powell, a sharp critic of the historical claims of some modern "intentionalists," acknowledges that common law interpreters frequently described the interpretive process as designed to yield the intent of the law-giver. *See* Powell, *supra* note 21, at 894-95 (acknowledging language from Justice John Marshall and seventeenth century jurist, John Selden, to this effect; contending, however, that common law methodology did not call for investigation beyond the law itself).

23. *See, e.g.*, Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

24. *See, e.g.*, Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930) (legislature's duty is not to "impose their will even within limits on their fellow citizens, but to 'pass statutes'").

25. This sort of pure textualism thus purports to find only the "text itself" to be authoritative, without regard to its social or historical context. Kay, *supra* note 23, at 230-34. For samples of this sort of view, see Bennett, *supra* note 18, at 459; Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 252-53 (1981); *see also* Kay, *supra* note 23, at 230 n.16 (collecting others with similar views); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 232-33 (1988) (arguing that "context of application" appropriately contributes to construing authoritative text as much as "context of utterance"; suggestion that text is more enduring and authoritative than "authorial intention").

ist” approaches to interpreting the Constitution; whereas textualism honors the instrument through which the legislature or constitutional adopters must speak, intentionalism seeks to honor the will of those empowered to establish law.²⁶

Frequently enough, commentators also appear to equate the so-called textualist canon with a nonoriginalist approach to interpretation, or with the method some commentators label as “noninterpretivist.” Noninterpretivist decision-making proceeds on the assumptions that the Constitution should be understood as having a changing or dynamic meaning and that courts are thus charged with elaborating the nation’s fundamental (constitutional) values without regard for either the orig-

26. For those who appear to hold this view, see *supra* note 25. Others are perhaps more difficult to classify. Jeff Powell, for example, presents a historical view of constitutional interpretation that is text-focused and excludes evidence that might bear on the original intent. See, e.g., Powell, *supra* note 21, at 921-23 (presenting Supreme Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) as following the rule that looked only at the Constitution’s “authoritative words”); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 511 n.24 (1988) (concluding from Powell’s treatment of *Chisholm* and other selections that he appears to see framers as textualists who opposed any reliance on “extraneous sources”). The problem is that Powell acknowledged, both in his treatment of *Chisholm* and elsewhere, that early interpreters looked at the text “in light of the evil it was meant to correct.” Powell, *supra* note 21, at 922. For treatment of the problems this creates for maintaining a significant distinction between “textualism” and “intentionalism,” see *infra* notes 55-58 and accompanying text.

While this textualist/intentionalist distinction appears to have been popularized in the work of Professor Paul Brest, see Brest, *supra* note 13, at 205 (section of article entitled “Textualism”), his textualism also appears to be of a different cast than the pure textualism described in text. Brest also underscores that the text is read in the light of its social and linguistic context, and an originalist textualism, in his view, seeks the meaning of the text, and the purposes that would be perceived for it, by a member of the society at the time of adoption. *Id.* at 208, 218. Compare Bennett, *supra* note 18, at 457-59 (considering authority of text, apparently as read in a linguistic, but completely unhistorical, context). Intentionalism, by contrast, is concerned (says Brest) with “the adopters’ subjective purposes” in adopting the language as manifest by text, the history surrounding adoption, and the ideologies and practices of the time. Brest, *supra* note 13, at 208, 218. In a footnote, he acknowledges that a textualist also might look at “the occasion for the utterance,” *id.* at 206 n.11, but he seems to limit the idea to legislative use of legal terms of art.

It appears that Brest’s textualism would not permit evidence placing the text within the context of the history of the times, including the known reasons for the enactment of the constitutional provision in question. (There is some room for doubt inasmuch as many formulations of the plain meaning canon of construction, which he invokes as an example of textualism, provide for consideration of the historical context at least where there is room for doubt linguistically; the plain meaning case he specifically cites, however, does not acknowledge such a qualification.) Even so, Brest acknowledges that originalist versions of the two methods are in sharp conflict only in a clash between their most extreme variants—an acontextual literalism and an intentionalism that gives authoritative character to evidence of the intended applications of enactments and gives the text itself only evidentiary significance. *Id.* at 222-23.

inal meaning of the text or the original intentions of those who drafted or ratified the text.²⁷ The idea that textualism amounts to noninterpretivism apparently rests on the assumption that when the text of the Constitution is read purely as a text, its general and vague language effectively grants an open-ended discretion that permits modern interpreters to adapt the Constitution to the evolving needs of society.²⁸

Along similar lines, if the focus is more on the text than on the intent of those who drafted it, it is intimated that the meaning is more like something that the interpreter fashions from raw materials than it is like something that was "locked up" inside the text by those who had authority to adopt the text.²⁹ Additionally, the proposed distinction between textualism and intentionalism has served as a premise in the argument that originalism is a self-contradictory theory inasmuch as the adopters of the Constitution were themselves textualists who did not intend interpreters to be bound by substantive intentions of the Constitution's framers.³⁰ This historical argument will be taken up in the section which follows.

27. The distinction between interpretivism and noninterpretivism was first set forth, I believe, in Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Paul Brest defends basically the same idea under the rubric of nonoriginalism. Brest, *supra* note 13.

28. See, e.g., Bennett, *supra* note 18, at 457-59, 459 n.45 (emphasizing that important pieces of constitutional language bring little constraint, with the apparent implication that only the viability of original intent theory would make originalism meaningful; text so understood appears to be read without regard to any original social context or historical purpose). By contrast, Brest recognizes that textualism might proceed on originalist premises and require historical research to determine at least the linguistic and social context of the interpreted text. Brest, *supra* note 13, at 208-09.

29. See Powell, *supra* note 21, at 899 (centrality of precedent in construction of statutes "followed almost by definition from the basic notion of 'intent' as a product of the interpretive process rather than something locked into the text by its author"). For a powerful critique of the view of interpretation that would so sharply separate text from intent, see Kay, *supra* note 23, at 229-36.

30. See *supra* note 18 and accompanying text (citing authorities).

Sometimes this sort of argument is used merely to point up an internal inconsistency in the work of some intentionalists who (1) justify intentionalism exclusively because it is what the framers intended and (2) purport to be bound by every intent of the founders of relevance to constitutionalism, whether or not found in any text. All too often, however, this argument is offered as though it really were a sort of trump card in the current debate. Even if we are correct in thinking that we should view ourselves as bound by the original intent, the argument goes, the intent of the framers was that we not look at their actual intentions. The tendency is reflected in the all-too common reliance of constitutional scholars on Professor Powell's oft-cited article setting forth early views of constitutional interpretation to demonstrate the incoherence of a constitutional jurisprudence based on original intent. See Powell, *supra* note 21. For a response to this sort of incoherence argument, see Kay, *supra* note 23, at 259-60.

Professor Dickerson has much to offer those attempting to address the significance of the distinction between textualism and intentionalism. While many participants in recent debate would be tempted to label Dickerson as a textualist, and not as an intentionalist — particularly in light of his opposition to reliance on internal legislative history for determining the intended meaning of statutes — Dickerson's work embodies the view that the textualist/intentionalist distinction has been overdrawn and the tension between his starting assumptions greatly overstated. Dickerson was both a textualist and an intentionalist.

For one thing, Professor Dickerson was a sharp critic of the view that the search for legislative "intent" is at best a fiction and at worst a positive impediment to the task of construing statutes. Dickerson was committed to the proposition that the aim of interpretation is to determine the intent of the legislature, which he took as referring "to the actual intent of some human being, or group of human beings, respecting what he or they intended to say."³¹ For Dickerson, this was implicit in the ordinary expectations of users of language: the expectation is "that the reader or hearer will take the language as referring to what the user had in mind," which means that the reader will understand "the specific message that the user intended to convey."³²

Professor Dickerson was well aware of the various grounds for skepticism as to whether we can know an individual's intent, let alone that of a legislative body; indeed, he offered a thoughtful critique of arguments against deep skepticism on such grounds.³³ His comments as to our ability to know with certainty even an individual's actual intent is itself instructive:

We have, of course, no means of peering into an individual's consciousness. Unfortunately, the argument proves too much: Communication itself is impossible, inside and outside the law. It is interesting, indeed to speculate on [the skeptic's] own 'legislative intent.' By his apparent standards, it cannot be inferred from the language of his article. On the other hand, it is comforting to know

31. DICKERSON, *supra* note 1, at 69.

32. *Id.* Dickerson also observed that actual communication through language necessarily relies on "tacit legislative assumptions," which consist of "underlying propositions that the user of language takes for granted without taking express account of them and, perhaps, even without even being aware of them." *Id.* These tacit assumptions play an important role in simplifying communication, and thus the limiting force of context frequently provides the basis for avoiding absurdly literal or overbroad applications of general language that would yield unthinkable results.

33. *Id.* at 67-79.

that despite this baffling problem the philosophers of language still presume to communicate.³⁴

Needless to say, skeptical constitutional law scholars also continue to publish articles which they presumably expect to be understood.

Professor Dickerson also recognized that the purpose of reading statutory or constitutional text in a relevant and meaningful context is to ensure that we understand (to the extent possible) the intended meaning of the text rather than some acontextual, perhaps unduly literal, rendering of the words in front of us. One of the compelling sections of Dickerson's book on statutory interpretation includes an incisive analysis of the plain meaning rule that dominated American statutory interpretation until relatively recently.³⁵ One version of the rule, which is really a rule of literalness, required courts to interpret the words of statutes "according to their relevant dictionary senses" without reference to any contextual aids.³⁶ But as Dickerson responds: "[T]o exclude consideration of context would be to ignore one of the basic principles of communication."³⁷

Excluding consideration of context is also to disregard that the reason we give effect to constitutional or statutory language is because of the authority we give to the intentional act that gave that language the force of law. We all know that the role of legislatures, as well as constitutional adopters, is not simply to "pass statutes" or to "adopt constitutions," but to establish principle and policy, and that we honor their words because we recognize their authority to do so.³⁸ As Richard S. Kay has forcefully argued:

To give effect to the words used independently of the intentional act which created them is to disregard exactly that which makes the text demand our attention in the first place. That the words will bear some different meaning is purely happenstance. Without their political history, the words of the Constitution have no more claim on us than those of any other text.³⁹

34. *Id.* at 74-75.

35. *Id.* at 229-32.

36. *Id.* at 230.

37. *Id.* Similarly, Paul Brest has observed that literalism "will yield unresolvable indeterminacies of language or just nonsense." Brest, *supra* note 13, at 207. For some that may be the point; if textualism is equated with literalism, indeterminacy is resolved and nonsense avoided only if the constitutional text is given real sense *by the modern interpreter*.

38. Professor Landis long ago responded to the contrary suggestion with the observation that statutes have long been understood as fulfilling the need for "an intelligible method of making known to the organs of administration, courts or otherwise, [legislative] desires and hopes." Landis, *supra* note 22, at 886.

39. Kay, *supra* note 19, at 1193. Similarly, Professor McConnell has observed that if we

As Dickerson stated, in the context of statutory interpretation, the search for intent is required by the initial premise of legislative supremacy, and indeed "the most important function of the concept of subjective legislative intent is to put the judge or other interpreter in a proper, deferential frame of mind *vis-a-vis* the legislature."⁴⁰

B. Text, Context, and Intent in American History

Dickerson's treatment of how we harmonize the commitment to both the text and the search for the actually intended meaning can aid those who are struggling with issues raised by the evolving traditions of constitutional and statutory interpretation. Some modern commentators have suggested that the search for the subjective intent of the framers and adopters of the Constitution is basically foreign to the canons of constitutional interpretation that dominated the period surrounding the ratification of the original Constitution.⁴¹ In a widely cited article, for example, H. Jefferson Powell has contended that most Americans who were influential in the framing, ratification, and early interpretation of the federal Constitution drew their preferred approaches to constitutional construction from the canons of statutory interpretation known in the common law.⁴²

1. *The Common Law Approach*

According to Professor Powell and, more recently, Hans W. Baade, the common law approach to statutory interpretation referred to legislative intent, but applied an "objective" theory that "focuses

acknowledge that the authority of the text comes from its having been adopted by the people, it follows that the principles never adopted by the people cannot be authoritative, even if they have some linguistic plausibility. Functionally, to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever. The only difference between the unintended meaning and the extratextual principle is verbal happenstance.

Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1528 (1989); see also Perry, *supra* note 19, at 690-91; Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989) (referring to statutory interpretation).

40. DICKERSON, *supra* note 1, at 85-86

41. Powell, *supra* note 21; Baade, *supra* note 18, at 1006-61.

42. Powell, *supra* note 21, at 901-02; ("Most Americans in public life in 1790's accepted the propriety of a statutory analogy for constitutional construction.") *Id.* at 923. Powell finds that there was also sentiment during the founding era that took a negative stance toward the very concept of "construction," with the implication that all construction sought to vary from the text itself. *Id.* at 889-94. Powell concludes, however, that construction came to be seen as a practical necessity, which in turn prompted reliance on known resources for that endeavor, the common law. *Id.* at 894-902.

on the purpose of the enactment as promulgated," as contrasted with a "subjective" theory by which "one seeks to ascertain the actual intent of its authors."⁴³ Powell characterizes the common law approaches to statutory interpretation during the period following the adoption of the Constitution as basically ranging from textualism to literalism. One sort of view referred to "the intent of the act" or the "intent of the legislature," but focused exclusively on "the words of the text and the common law background of the statute."⁴⁴

A more extreme view, which developed late in the eighteenth century and into the nineteenth, was the literalism that insisted that statutory interpretation only required the judge to know the meaning of the words used in the statute.⁴⁵ In the constitutional context, the textualist canon appears to be summed up in Alexander Hamilton's oft-quoted formulation: "[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself."⁴⁶ The evidence, then, we are told, is that the founders were textualists rather than intentionalists.

Once again, however, as Professor Dickerson reminded us, we tend to make too much of the distinction between subjective inten-

43. The language is Baade's. Baade, *supra* note 18, at 1006; see *id.* at 1013 (concluding that common law rejected the search for actual legislative intent in favor of the view that "the sense of the enactment 'must be collected from what it says when passed into a law,' and not from its legislative history") (quoting *Millar v. Taylor*, 98 Eng. Rep. 201, 217 (K.B. 1769). Accord, Powell, *supra* note 21, at 895 (at common law "the 'intent' of the maker of the legal document and the 'intent' of the document itself were one and the same; 'intent' did not depend upon the subjective purposes of the author"); *id.* at 903 (the framers' "primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language"); *id.* at 948 ("[o]f the numerous hermeneutical options that were available in the framers' day — among them, the renunciation of construction altogether — none corresponds to the modern notion of intentionalism"; indeed, early interpreters "usually applied standard techniques of statutory construction to the Constitution"); *id.* at 948 n.331 (to follow "the interpretive intentions of the generation of the framers, the modern intentionalist would have to abandon his or her intentionalism and adopt the common law view of the 'intention' of a statute, or disavow the legitimacy of any extratextual interpretation in the manner of the anti-hermeneutical traditions of British Protestantism and European Rationalism").

44. Powell, *supra* note 21, at 898.

45. *Id.* at 900-01. Recall Professor Dickerson's criticism of this literalist canon as flatly ignoring the principles that govern meaningful communication. See *supra* note 37 and accompanying text.

46. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed. 1965). It is frequently thought that Hamilton's commitment to this formulation of a "textualist" canon is reinforced by the context of the statement as a sufficient answer to Thomas Jefferson's argument against the first national bank based on the Philadelphia convention's decision not to expressly grant a power of incorporation to the national government. For an analysis of Hamilton's position, see *infra* note 98.

tionalism and common law methods that paid lip service to intent while emphasizing the "objective" intent embodied in the text. As Dickerson observed, while the dichotomy "is usually explained in terms of whether the pursuer of meaning is preoccupied with the statute itself (an objective legal writing) or with the actual, and therefore subjective, intent of the legislature," in practice the distinction is "between disregarding legislative history and taking it into account."⁴⁷ For Dickerson, however, the search for an actual corporate intent of the legislature involves not "a commitment to examining any specific kind of evidence," but only an attempt "to ascertaining intent by inference from an examination of appropriate text and context."⁴⁸

Equally telling, Professor Dickerson observes that the tendency to pit textualism against intentionalism by pointing to the principle that the statutory text is the exclusive vehicle for communicating legislative will assumes that "the words of the statute are unrelated to the subjective legislative intent that lies behind it," and "that any supposed legislative intent stands apart from the statute and competes with it."⁴⁹ To the contrary, it is frequently observed that the text is generally the best and most reliable evidence we have of the underlying intent.⁵⁰ Moreover, when we say that we are interested in the meaning

47. DICKERSON, *supra* note 1, at 83; *accord*, Kay, *supra* note 23, at 233 (noting that "English courts have never suggested that the lawmakers' intent is not the critical object sought in statutory construction"). Compare Baade, *supra* note 18, at 1006 (assuming without explanation that "[t]he determination of subjective legislative intent requires consideration of legislative history, including especially the parliamentary proceedings leading up to the adoption of the enactment, and possibly also indicia of the motives of individual legislators"); Perry, *supra* note 19, at 677 (distinguishing between "subjective intentions" and "objective meaning" versions of originalism while viewing the latter as nevertheless looking for "the meaning to, or the understanding of," the public represented by the ratifiers).

48. DICKERSON, *supra* note 1, at 84.

49. *Id.* at 77. For a modern explication of text and intent in constitutional interpretation along these lines, see Bennett, *supra* note 18, at 459 (contending that "[o]nce text and intent are seen as separable, the former comfortably assumes authoritativeness in a way that the latter cannot"). For samples of the sort of interpretation to which this sort of insistence on the authority of the text as text (apart from any intentions concerning it) leads interpreters, see the examples set forth in text and notes *infra* Part IV-C.

50. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 16 (1980); Kay, *supra* note 23, at 234-35; Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 418-20 (1985); Brest, *supra* note 13, at 206. Dickerson makes the point this way: rather than use "the search for legislative intent as a guide to statutory meaning," it is more defensible to "search for statutory meaning as a guide to legislative intent." Dickerson, *supra* note 3, at 779.

In fairness to modern constitutional commentators who have criticized "intentionalism," they have often been contrasting traditional approaches with the interpretive methodology of Raoul Berger, which admittedly presents a rather extreme version of intentionalism that sees

of the text, rather than some unenacted (perhaps private) intent, even of those who made the law,⁵¹ we do not thereby assert that we are not interested in determining the intended meaning of the text, as revealed (in part) by a consideration of its historical context.⁵²

Finally, Dickerson points out that those who purposefully avoid the apparently "subjective" implications of the word "intent" are often found "resorting to euphemisms to describe it."⁵³ Along these lines, Professor Baade's description of the "objective" canons of common law construction states that they looked to "the purpose of the enactment,"⁵⁴ as though the search for purpose looked for something somehow less subjective than the search for intent.

In fact, just as Professor Dickerson's analysis would suggest, when the common law rule that eschewed reliance upon internal legislative history is examined more closely, it becomes apparent that it is not nearly the anti-intentionalist canon that it is sometimes characterized as being. Thus Professors Powell and Baade acknowledge, though they hardly emphasize, that the common law rule did not preclude consideration of extrinsic evidence as to the historical background of the statute, the relationship between the statute and related enactments, and other external indicia of the intention of the

intent as the law, capable of overriding text, and text as, at most, evidence of the intent of the sovereign people or legislature. See, e.g., Baade, *supra* note 18, at 1006 (referring to Berger's "radical" originalism that takes the view that "a provable intention would override the words" (quoting Raoul Berger, *The Founders' Views — According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1062 (1989))).

Perhaps less understandable is the tendency to assume that Berger presents the standard originalist position and then to treat more sophisticated and defensible versions as reflective of retreat to a new position in the face of conflicting historical scholarship. E.g., Baade, *supra* note 18, at 1003 n.6, 1104-07. In fact, my own extensive criticisms of Berger's interpretive methodology were offered prior to the publication of Professor Powell's historical critique of modern originalism. E.g., McAfee, *Berger v. The Supreme Court*, *supra* note 2.

51. See BORK, *supra* note 50, at 144 (observing that law prohibiting "sale" of automatic weapons would be applied according to its terms even if some legislators testified that in voting they had only intended to prohibit the "use" of such weapons).

52. See Kay, *supra* note 23, at 235 & n.47 (indicating that we are looking for a *verbal* intention — what the individual thought she was *saying* — not all the meanings or intentions entertained when she entertained what she wrote or adopted). Reliance on evidence of context that aids us to explicate a statute shows fidelity to the act of will that became law; reliance on evidence of a conflicting intent dishonors the legislature's supreme power *to make law*.

53. DICKERSON, *supra* note 1, at 77. To illustrate, Dickerson used the example of Max Radin's allusion to a legislature's ability by certain devices to foreclose interpreters' attempts to displace what the legislature "regarded" as an important purpose of a statute. *Id.* at 78. If legislatures are capable of "regarding," Dickerson concluded, perhaps they are also capable of "intending." *Id.*

54. Baade, *supra* note 18, at 1006.

legislature.⁵⁵ Powell, for example, gives two sentences to the rule in *Heydon's Case*,⁵⁶ which enjoins courts to consider statutes in their context as a remedy to a perceived defect or mischief in the common law; but he immediately turns his attention to the reliance of courts on statutes' preambles as the key to determining legislative purpose and then asserts that judicial precedent "served as the most important source of information as to an act's meaning beyond its actual text."⁵⁷

Yet these devices move courts well beyond a merely textualist canon of construction to a consideration of the text in a relevant context; and the point of such exercises can hardly be anything other than the discovery of the originally intended meaning.⁵⁸ The point is well illustrated by the work of Chief Justice John Marshall, who is frequently characterized as a textualist who decided his most famous cases, *Marbury v. Madison*⁵⁹ and *McCulloch v. Maryland*⁶⁰, without reference to the legislative history of the framing and ratification of the Constitution.⁶¹

55. Powell, *supra* note 21, at 898-99, 942-43; Baade, *supra* note 18, at 1006-1007, 1041, 1091 & n.644.

56. 76 Eng. Rep. 637 (K.B. 1584). The case is treated at Powell, *supra* note 21, at 898-99. Similarly, Professor Baade's initial descriptions of the common law rule included reference to, but did not elaborate on, its provision for reliance on evidence as to the occasion for the enactment. Baade, *supra* note 18, at 1006, 1007. When he subsequently treats this dimension in more depth — as part of a description of a perceived nineteenth century historical shift from recourse to "public history" to reliance on "framers' intent"—it is only after a rather lengthy treatment of interpretive canons that contrasted the search for subjective intent in legislative history with the objective approach that focused on the text of the statute. *Id.* at 1041-43.

57. Powell, *supra* note 21, at 899. Powell supports the quoted statement with a single citation to a private letter of Thomas Jefferson, *id.* at 899 n.70, hardly a traditional authority as to the "common law tradition." *Id.* at 898. For more on the suggestion that important founders valued usage more than an inquiry into intent in constitutional interpretation, see *infra* note 73.

58. *Accord*, Kay, *supra* note 23, at 233-34, 274. Apart from the mischief rule, Kay observes that judicial decisions employing the "golden rule" of statutory construction, a common-law approach which limited general statutory language to avoid absurd results not within the contemplation of the legislature, also reflected that courts perceived their duty to be to the *decision expressed by the text* rather than merely to the text as such. *Id.* at 233. These critical qualifications of what is described as "textualism" are occasionally acknowledged, even if obliquely, by those who would separate the founders from intentionalism. *E.g.*, Brest, *supra* note 13, at 215 (practice of statutory interpretation through mid-19th century indicates that framers intended "a mode of interpretation that was *more textualist than intentionalist*" inasmuch as plain meaning rule was invoked and recourse to legislative debates was considered improper) (emphasis added).

59. 5 U.S. (1 Cranch) 137 (1803).

60. 32 U.S. (7 Pet.) 243 (1833). For description and assessment of Marshall's approach in *McCulloch*, see Baade, *supra* note 18, at 1033-35.

61. Powell, for example, contends that Marshall, like other common lawyers, referred to the intent of the framers, or to the intent of those who gave the powers to the national government, "without thereby implying that he was relying on any extratextual evidence of that intention."

2. Chief Justice Marshall — A Test Case

Our understanding of Justice Marshall's approach to constitutional interpretation in his most famous cases might be enhanced by a review of his opinion in *Barron v. Mayor of Baltimore*.⁶² The issue, of course, was whether the generally worded Just Compensation Clause of the Fifth Amendment applied to the States. Unlike the First Amendment, which is directed explicitly at limiting the powers of Congress, the Fifth Amendment includes no similar limiting language; on the other hand, it also does not purport by its terms to serve as a limit on the powers of state government. In short, it provides a classic example of what Professor Dickerson describes as "contextual ambiguity" — although the individual words and sentence structure do not create an ambiguity, the omission of any reference as to the level or levels of government to which the provision is directed creates uncertainty as to "which of two or more alternatives was intended."⁶³ In other words, the question is whether the framers used general language and omitted restrictive words in order to convey that, by contrast to the First Amendment, the provision applies to both the states and federal government, or, alternatively, tacitly assumed that the reader would understand that the limitations were drafted against the federal government.

Since the ambiguity presented by the Fifth Amendment and other generally worded provisions of the Bill of Rights was contextual in nature, this obviously was not a fitting case for any sort of question-begging literalism.⁶⁴ Unsurprisingly, then, Justice Marshall began his treatment of the issue by looking to history and structure. He observed that the states had their own constitutions, which included desired "limitations and restrictions" on the governments thus established.⁶⁵ In the Federal Constitution, on the other hand, the people of the

Powell, *supra* note 21, at 943 n.307; *see id.* at 943 (arguing that in light of Marshall's traditional view of statutory construction and acceptance of statutory analogy for interpreting the Constitution, Marshall appropriately held that "a construction 'within the words' of a constitutional provision is legitimate regardless of whether the framers foresaw or intended it").

62. 32 U.S. (7 Pet.) 243 (1833).

63. DICKERSON, *supra* note 1, at 47.

64. Not all would agree. Professor Crosskey thought this general language was at least presumptively applicable to all levels of government unless clear evidence established the contrary. His plain meaning (and, really, acontextual and over-literal) reading of the general language of these provisions was at least reinforced by the specific textual references to the national government in two of the amendments. For criticism of Crosskey's reading, see *infra* notes 122-146 and accompanying text.

65. *Barron*, 32 U.S. (7 Pet.) at 247.

United States created their own government and conferred powers to promote their common interest.⁶⁶ Given this historical background, Marshall concluded that generally worded limitations on power were “naturally, and, we think, necessarily applicable to the government created by the instrument.”⁶⁷

To buttress his historically-based structural argument, Marshall looked to the balance of the text of the Constitution and found that the division of federal and state limitations in Article I, Sections 9 and 10 reflected that the framers carefully separated limitations imposed on state government from those imposed on the newly-created national government.⁶⁸ Marshall concluded that the framers of the Bill of Rights would have followed this pattern and stated limits on state power expressly and in separate provisions.⁶⁹ Even in the setting of this “whole text” argument from the internal context of the Constitution, however, Justice Marshall turned back to the general historical background; to Marshall the historical background made it clear that had “[C]ongress engaged in the extraordinary occupation of improving the constitutions of the several states, . . . they would have declared this purpose in plain and intelligible language.”⁷⁰

Having already set forth general historical background and structural argument, buttressed by whole text analysis, Justice Marshall thought it important as well to set out the immediate historical setting that led to the Federal Bill of Rights — to the end of discovering the mischief for which the amendments were to be the cure. Reviewing the history of the ratification of the Constitution, including the demand in various state conventions for a bill of rights to secure the people’s rights against potential encroachments by the general government, Marshall concluded that there was no contextual basis for finding that the amendments were in any way aimed at controlling the local governments of the states.⁷¹ In short, Justice Marshall’s opinion was clearly more intentionalist than purely textualist.⁷²

66. *Id.*

67. *Id.*

68. *Id.* at 248-49. Indeed, Justice Marshall observed that the “inhibitions” on the state governments contained in Article I, Section 10 related to “subjects entrusted to the general government, or in which the people of all the states feel an interest.” *Id.* at 249. The clear implication was that this cut against the likelihood that the first Congress and state legislatures had intended to adopt more general limitations on the states. For a more extensive elaboration of the initial premise of this argument, see Robert C. Palmer, *Liberties as Constitutional Provisions — 1776-1791*, in *CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* 55, 97-100 (1987).

69. 32 U.S. (7 Pet.) at 249.

70. *Id.* at 250.

71. *Id.*

72. For a similar analysis of Justice Marshall’s opinion in *Sturgis v. Crowninshield*, 17 U.S.

Moreover, it is widely agreed that “[i]n terms of the original understanding, *Barron* was almost certainly correctly decided.”⁷³ As a nationalist, however, Justice Marshall could undoubtedly have seized upon the apparent ambiguity created by the omission of a clear referent from the Fifth Amendment text to expand the power of the federal government and to offer added protections to individuals against state oppression. By itself, the text would not have prevented it.⁷⁴ By 1933, a hundred years later, and even without a Civil War, the temptation to rely upon the “generality of the text” or a “plain language” reading of rights provisions lacking an explicit limiting term, could have been almost overwhelming to a judge who perceived the needs of a shrinking nation and was bred on the teachings of realist jurisprudence.⁷⁵ But Justice Marshall was not such a “textualist” as some of his modernist counterparts; his search for the intended meaning of the text in context was for him an historical inquiry to discover what “the framers of [the] amendments intended.”⁷⁶

(4 Wheat.) 122 (1819), see Kay, *supra* note 23, at 279-80.

73. ELY, *supra* note 50, at 196 n.58 (1980); CONSTITUTIONAL LAW 779 (Geoffrey R. Stone et al. eds., 2d ed., 1991); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 3 (1978).

74. Indeed, William W. Crosskey argued that the plain meaning of the language of the Bill of Rights requires the conclusion that its generally worded provisions apply to the states. See *infra* notes 122-124 and accompanying text.

75. The suggestion made in text may seem farfetched to some, but it should be recalled that modern constitutional law scholars have made themselves quite comfortable with the idea that the Due Process Clauses of the Fifth and Fourteenth Amendments are sufficiently vague and open-textured to lend support to a modern fundamental rights jurisprudence. E.g., DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 267 (1989); Bennett, *supra* note 18, at 459 n.45; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980). Most of these endorsements simply ignore the historical question of whether this is the soundest reading of the language read in an appropriate context, and one, offered by Robert Bennett, explicitly excludes any reference to considering the text in a relevant historical context. For a critique, see McAfee, *Constitutional Interpretation*, *supra* note 2, at 291-93.

76. *Barron*, 32 U.S. (7 Pet.) at 250. It is striking that Justice Marshall refers to *framers'* intent, even though he had emphasized in *McCulloch* that the authority of the Constitution was derived from the vote of the ratifiers rather than from the decisions made in Philadelphia. See *infra* note 80. Perhaps Justice Marshall presumed, similarly to modern originalists, that the authoritative adopters would likely have voted in favor of the Constitution in accordance with what they took to be the meaning intended by those who framed it. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 & n.130 (1981) (acknowledging that “the intention of the ratifiers, not the Framers, is in principle decisive,” but suggesting that it is reasonable to treat evidence of the intent of the framers as “a fair reflection of” ratifier intent; acknowledging that hidden intentions are not what we seek).

Modern commentators do not criticize Justice Marshall's statements that he inquired after the intentions of the framers, even though: (1) he inferred those intentions from reading the text in light of the historical context rather than by reference to the notes or journals of the

Justice Marshall's opinion in *McCulloch v. Maryland* has become an important exhibit supporting the conclusion that he employed a textualist canon of construction and eschewed reliance on evidence of actual intent.⁷⁷ In support of this view, commentators point to Marshall's "whole text" analysis, supplemented by a general theory of the nature of constitutions as legal texts, to establish the doctrine of implied powers, as well as his careful exegesis of the language of the Necessary and Proper Clause without any aid of the constitutional equivalent of internal legislative history.⁷⁸ Less centrally, it is observed that Justice Marshall's opinion emphasizes that established practice should have due weight in constitutional interpretation.⁷⁹

Convention; and (2) he apparently presumed that the authoritative adopters were giving effect to what they took to be the framers' intentions. Yet they charge modern originalists with inconsistency when they speak of "framers' intent" and then examine evidence from the historical background and the ratification materials rather than the notes of what transpired in Philadelphia. See, e.g., Baade, *supra* note 18, at 1003 & n.6.

77. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See e.g., Baade, *supra* note 18, at 1033-35.

78. Baade, *supra* note 18, at 1034.

79. *Id.* at 1035; See also *id.* at 1106 (arguing that James Madison signed the bill creating the Second Bank because he had come "to regard the actual intent of the Founding Fathers as irrelevant or, at any rate, inferior to subsequent practice as a source of constitutional interpretation"); Powell, *supra* note 21, at 939-41 (developing a similar analysis suggesting that Madison gave greater weight to usage and precedent than to original intent or literal meaning). But see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77, 105-11 (1988) (reconciling Madison's originalism with his respect for usage and precedent); Kay, *supra* note 23, at 277-78 (same as Lofgren).

This sort of reliance on judicial use of precedent and established practice to support the notion that the framers did not believe in an originalist theory of interpretation has a question-begging quality to it. When modern originalists, like Judge Bork and Professor Henry Monaghan, acknowledge the weight of precedent, they are charged with self-contradiction. Notice, however, that Justice Marshall gives weight to precedent in *McCulloch* while recognizing that a "bold and daring usurpation" might be resisted despite being established by practice. 17 U.S. (4 Wheat.) at 401. The apparent implication is that he does not equate meaning with whatever is established by practice, and that he does not appear to see meaning as something to be extracted from a barren text by a creative court or other actor. But if he gives weight to precedent without simply equating it with meaning then perhaps Justice Marshall is an originalist caught in the same "contradiction" as Bork and Monaghan.

If anything is clear, however, it is that interpreters frequently express deep commitment to both original intention or meaning and established practice and precedent. Marshall's reliance on established practice could rest on: (1) the view that practice should prevail where the decision plausibly resolves initial indeterminacy; (2) the presumed evidentiary weight of the decision of those close to the adoption period; or (3) the idea that at least some "wrong" decisions ought to be privileged once the issue is resolved, especially where the question was not free from doubt. While some of these positions might bear on the underlying rationale for an originalist approach to interpretation, none appears to cast doubt on Marshall's claim to status as an originalist nor to preclude originalism as the most plausible way to interpret the Constitution.

Most importantly, however, commentators underscore that Justice Marshall completely omitted discussion of the Philadelphia Convention's decision against including a power to establish corporations among the enumerated powers of Congress — a decision that might seem highly relevant to an originalist analysis of the constitutionality of the Bank.⁸⁰ Since Marshall would clearly have been aware that this history had been relied upon by Madison and Jefferson during the original bank controversy, the omission of the matter seems unlikely to have been inadvertent.⁸¹ Based on an overall analysis of *McCulloch*, then, Baade adopts Leonard Levy's conclusion that "[o]nce again, original intent counted for nothing."⁸²

Without question, Justice Marshall's analysis in *McCulloch* was centered on the constitutional design and text: good legal interpretation is centered there. Clearly, however, Marshall's opinion goes beyond a mere reading of the text in light of his theory of the nature of constitutional instruments. For one thing, Justice Marshall begins his analysis of the doctrine of implied powers by exploring Maryland's claim that the Constitution's grant of powers was properly understood only as a delegation to a subordinate government from the sovereign states that made up the "compact" which the Constitution embodies.⁸³ In response, he develops the case for the view that the powers granted by the Constitution were delegated by a sovereign people to which the federal and state governments were subordinates.⁸⁴

Marshall's opinion makes it clear that he considers this to be a structural issue to be answered by a reading of the text against the background of the history of the framing and ratifying of the Con-

80. Baade, *supra* note 18, at 1036. Baade also observes that Justice Marshall noted in the opinion that the Constitution derived its authority from the state ratifying conventions, rather than from the Philadelphia convention, *id.* at 1033-34, which is a point that Madison relied upon in justifying his considered view that it was improper to rely upon the proceedings in Philadelphia in construing the Constitution. See Powell, *supra* note 21, at 921, 936, 938.

81. Baade, *supra* note 18, at 1036-37.

82. *Id.* at 1038 (quoting LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988)). Justice Marshall purported to be discovering the intent of the framers in *McCulloch*, but some modern commentators take him as referring to something quite different than what modern originalists assume. See *id.* at 1036 (concluding that "John Marshall's references to Framers' intent in the course of his opinion are directed to their *presumed* intent as inferred from the nature and the language of the instrument, and not to their *actual* intent as determined by recourse to the constitutional equivalent of legislative history"); Powell, *supra* note 21, at 943 (contending that although Marshall referred to the intentions of the framers in *McCulloch* opinion, he did so without "thereby implying that he was relying on any extratextual evidence of that intention").

83. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 311, 402-05 (1819).

84. *Id.*

stitution.⁸⁵ This was not, for Marshall, a dispute about the nature of constitutionalism to be resolved by normative political theory or by argument from the nature of things, but ultimately a question of political and intellectual history.⁸⁶ Thus, for example, he answered the specific claim that the people had previously surrendered all their powers to the States, and thus lacked any powers to grant, by invoking the well-established right of the people to alter and abolish their governments, a right that had been interpreted as empowering them to “resume and modify the powers granted to government.”⁸⁷

Moreover, while Justice Marshall’s analysis of the problem of implied powers mainly sounded in structure and text, he did not articulate any view that it would be improper to consider extrinsic evidence.⁸⁸ Later in the opinion, while addressing the issues raised by

85. In support of this conclusion Justice Marshall contended that the roots of the Constitution in the sovereignty of the people were shown by: (1) the text of the preamble; (2) the fact that ratification of the Constitution was by the people assembled in state conventions rather than by the state governments; (3) that ratification by the people was “felt and acknowledged” to be necessary to alter the confederation; (4) the fact that the federal government had powers, unlike the government under the confederation, to act directly on the people; and (5) the binding quality of the ratification process, including the lack of any veto power by the state governments. *Id.* at 403-04.

86. Marshall’s subsequent defenses of the *McCulloch* opinion elaborated somewhat further the historical grounding of the opinion’s view of the Constitution as emanating from the people. John Marshall, *A Friend to the Union*, in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 78, 85-91 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL’S DEFENSE]. Even his argument contrasting the preamble’s reference to “the people” with corresponding language from the Articles of Confederation referring to the states reflects that Marshall was reading the text in context in the attempt to discover its intended meaning. *Id.* at 85-86.

87. 17 U.S. (4 Wheat.) at 404. Professor Powell suggests that the constitutional theory to which Justice Marshall responded — called by many the “doctrines of 98” because it was first propounded during the crisis over the Alien and Sedition Acts — was claimed to embody “the plain intent and meaning” of the Constitution, but that this was not understood as a claim about actual intent but as a fair structural reading of the constitutional text. Powell, *supra* note 21, at 930-31, 945. He suggests that this reflected the common law textualism that governed contract law in particular, *id.* at 931, but one wonders if it was not really an application of the old dictum that if you don’t have the facts, you argue the law. *See id.* at 929-30 (historical critique of this republican theory). In any event, while Justice Marshall’s analysis is not lengthy or filled with citations (after all, he had participated in much of this), it cannot accurately be described as “four corners” textual analysis or as a purely structural theory.

88. Indeed, at one point, Marshall relied upon the omission of the word “expressly” from the Tenth Amendment, as contrasted with its inclusion in Article II of the Articles of Confederation — employing an interpretive strategy warranted by common law, which seeks intended meaning by comparing enactments that are related to each other. 17 U.S. (4 Wheat.) at 406-07. In fact, Justice Marshall returned to the occasion of the enactment of the Tenth Amendment to explain the omission, observing that “[t]he men who drew and adopted this amendment had experienced the embarrassments resulting from the word in the Articles of Confederation, and probably omitted it to avoid those embarrassments.” *Id.*

Maryland's tax on the Bank, Marshall confronted the defense of state taxing power based on the *Federalist Papers* and acknowledged that "the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution."⁸⁹ And when his critics charged that Justice Marshall's opinion contradicted the many assurances of the limited nature of the powers delegated by the Constitution offered during the course of the state ratifying debates, Marshall responded that the opinion acknowledged that the federal government was one of limited powers and that he had not fortified this position with such "respectable authorities" because he thought it unnecessary to prove a proposition that was "universally admitted."⁹⁰

It is also possible to make too much of the lack of attention given to the developments at the Convention by the *McCulloch* opinion. Despite speculation to the contrary, there is no evidence that the events at the Convention were argued to the Court, so Marshall may have felt no obligation to respond to the point.⁹¹ Even though Madison and Jefferson had both pointed to the rejection of a proposal to include a power to grant charters of incorporation as highly relevant to the bank issue, there are several reasons that could have warranted

89. 17 U.S. (4 Wheat.) at 433. See Kay, *supra* note 23, at 280 & n.271. Baade acknowledges Marshall's treatment of THE FEDERALIST PAPERS, but only several pages after his treatment of *McCulloch* as based on "the nature and the language of the instrument," Baade, *supra* note 18, at 1036, 1042.

90. John Marshall, *A Friend of the Constitution*, in JOHN MARSHALL'S DEFENSE, *supra* note 86, at 161-62. In fairness, Marshall ignored that these statements were relied upon not simply for the general principle of limited powers, but also for the narrowness with which they had formulated the principle underlying the Necessary and Proper Clause; but it is hardly surprising that Marshall would have preferred his own construction of the constitutional text to these reformulations of the text in the ratifying conventions.

Baade suggests that THE FEDERALIST PAPERS appear to have been regarded initially as a treatise rather than as a source of direct evidence of legislative purpose. Baade, *supra* note 18, at 1042 & n.272. Perhaps so, but Marshall's critics had referred to particular speeches offered at state ratifying conventions, and these speeches were among the "respectable authorities" to which Marshall alluded with approval. Moreover, as Baade himself notes, just two years after *McCulloch* Chief Justice Marshall relied upon THE FEDERALIST PAPERS not only on the grounds that it had "always been considered a great authority," *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821), but also because "the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." Baade, *supra* note 18, at 1042 & n.272.

91. Baade speculates that it is "not unlikely" that the subject of the Philadelphia proceedings was argued to the Court in *McCulloch*, given that Luther Martin, the lead counsel for the state of Maryland, had been a delegate to the Convention, and the published record of the argument is a synopsis. Baade, *supra* note 18, at 1038. At the same time, if the matter was not raised to the Court, that fact may itself reflect the view that it was beyond the proper context for construing the Constitution.

Marshall's disagreement with that assessment. In the first place, it is difficult to see this bit of drafting history as itself part of the context of Article I, Section 8. After all, given that the Convention records were not available to delegates who considered ratifying the Constitution, the ratifiers could not have relied on any such decision in their attempt to understand the Constitution.⁹² Obviously the intended "legislative audience," the American public, also could not have been aware of any such decision.

Second, the evidence itself is far less decisive of the actual intent of the members of the Convention than has sometimes been supposed.⁹³ As to the Bank itself, Madison had proposed enlarging a motion to empower Congress to build canals to include a general power of incorporation where the interests of the nation required it.⁹⁴ Rufus King suggested that the states would be "prejudiced and divided into parties" by the proposal because it would provoke fears that such a provision would permit "the establishment of a Bank" or the creation of "mercantile monopolies."⁹⁵ One immediate problem for seeing the vote as conclusive of an intent that Congress would hold no such power, express or implied, is the possibility (difficult to prove or disprove) that many voted against the proposal because of the difficulties such an express provision might create for winning ratification rather than because they did not believe the Constitution should, or implicitly did, contain such a power.⁹⁶

92. In statutory terms, this would be the equivalent of relying on evidence of the internal deliberations of a legislative drafting committee that did not report to the legislative body that enacted the statute. Consider this 1791 argument of Albert Gallatin:

The intention of a Legislature who pass a law may perhaps, though with caution, be resorted to, in order to explain or construe the law; but would any person recur to the intention, opinion, and private construction of the clerk who might have been employed to draft the bill? . . . The people and the State Conventions who ratified[,] who adopted the instrument, are alone parties to it, and their intentions alone might, with any degree of propriety, be resorted to.

5 ANNALS OF CONG. 734 (1797) (statement by Albert Gallatin).

93. E.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY 378, 386 (1977); Berger, *supra* note 17, at 1174; Baade, *supra* note 18, at 1106 (asserting that Marshall wrote *McCulloch* despite his awareness of "the actual intent of the Founding Fathers *not* to grant Congress the power to incorporate banks"). For a brief criticism of Berger's too-quick conclusion that the Convention vote was dispositive of the constitutionality of the bank, anticipating what is developed here, see McAfee, *Berger v. The Supreme Court*, *supra* note 2, at 260 n.251.

94. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 615 (Max Farrand ed., 1937) (Sept. 14, 1787) [hereinafter Farrand].

95. *Id.* at 616.

96. See Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), in 3 Farrand, *supra* note 94, at 494-95 (stating that proposal for canals was "was rejected from an apprehension, chiefly, that it might prove an obstacle to the adoption of the Constitution"); James B. Thayer,

More fundamentally, the basic problem is that the importance of this vote turns largely on a presupposition that the Convention understood the Necessary and Proper Clause as being of rather narrow scope, such that a negative vote on a proposal for the express inclusion of a power virtually implied its exclusion. The Convention materials, however, are insufficient to establish such a proposition. Thus in the course of the brief discussion of the incorporation proposal, James Wilson and George Mason disagreed as to whether the power to create mercantile monopolies (which King had suggested would create controversy) was already implicit in the power to regulate commerce.⁹⁷ In addition, Alexander Hamilton later suggested that one group of members had thought it “unnecessary to *specify* the power, and inexpedient to furnish an additional topic of objection to the Constitution.”⁹⁸

Legal Tender, 1 HARV. L. REV. 73, 78 n.2 (1887) (observing that as to issues relating to legal tender there was evidence that ratification prospects influenced the debate over inclusion of powers; setting forth related evidence suggesting that a number of framers believed some such powers to be implicit without express inclusion).

Of course, Madison's initial reliance on the rejection of his own proposal in opposing the Bank was apparently based on the view, which he later professed, that the negative vote reflected the widespread conviction that such a power was “improper to be vested in Congress,” as well as “not likely to be yielded by the States.” Letter from James Madison to Edward Livingston (April 17, 1824), in 3 FARRAND, *supra* note 94, at 463. But we have virtually no evidence from the convention as to whether Madison's view on this was the correct one.

97. FARRAND, *supra* note 94, at 616. While Baade concludes that the bank decision clearly violated the original intent canon which he apparently does not embrace (*supra* note 93), arguably he fails to heed Jeff Powell's rule for originalists that enjoins caution about presuming consensus from limited data. POWELL, *supra* note 21, at 684-85 (stating “rule” and using specific example of the Wilson-Mason colloquy on the power to create “mercantile monopolies”; concluding that the records leave us unable to determine whether more delegates agreed with Wilson or Mason).

Levy, on the other hand, acknowledges that “original intent may not have been discernible,” but suggests nonetheless that it was “more likely” that the decision to go ahead with the first Bank reflected that “the constitutional text lent itself to reinterpretation in the light of policy preferences by the administration in power.” LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 10 (1988); cf. Thomas G. Gee, *Original Intent: “With Friends Like These . . .”*, 88 MICH. L. REV. 1335, 1339 (1990) (book review) (arguing that Levy's book suggests that he prefers a judicial revisionary power; question raised is whether Levy is projecting his own view).

98. Alexander Hamilton, *On the Constitutionality of the Bank*, in 2 FARRAND, *supra* note 94, at 363, 364. Hamilton concluded that “[i]n this state of the matter, no inference can be drawn from [the rejection of the proposal].” Hamilton also contended, as we have noted above (*see supra* note 46 and accompanying text), that if the intention of the framers can be deduced by fair inference from the text read as a whole, arguments drawn from extrinsic circumstances should be rejected. This argument has often been taken as articulating a textualist approach that precluded all reliance on extrinsic evidence.

But Hamilton's argument can be read more narrowly as asserting the primacy of the text and insisting that care be exercised lest unreliable or inconclusive evidence be used to vary the text. As Charles A. Lofgren has observed, Hamilton himself used the wording and substance of

More generally, several members of the Convention, including Edmund Randolph and George Mason, explained their refusal to sign the finished product partly on the ground of their concerns about the potential implications of the Necessary and Proper Clause — objections that cut somewhat against the idea that there was a clear consensus in the Convention about the scope of that provision.⁹⁹ If there were a relevant consensus on that subject, we would expect that it would be more likely to be reflected during the debates over ratification of the Constitution than at the Convention. In light of the above, it is perhaps not surprising that both Madison and Jefferson treated the vote in question as basically confirming evidence of the position they had argued for on other grounds, and that Madison was willing to jettison the point as he considered the uses and abuses to which the Convention notes might be put.

Constitutional history suggests, then, that the adopters of the Constitution had a basic understanding of what Professor Dickerson clarified for us conceptually. There is no war between text and intent, and one may quite comfortably be a “textualist” who is seeking the text’s originally intended meaning by examining the text in a relevant context. The point is to keep the balance true: we want to implement the will of the people acting through their agents, but it is only the will they embody in the written Constitution that is authoritative.¹⁰⁰ It

the anti-monopoly amendments proposed by the state ratifying conventions to support the idea that they contemplated an “inherent” power in Congress to erect corporations. 3 *THE WORKS OF ALEXANDER HAMILTON* 445, 453, 488 (Henry C. Lodge ed., 1904); see Lofgren, *supra* note 79, at 94 n.58; Kay, *supra* note 23, at 275 n.235. That alone places Hamilton in the position of relying on the constitutional equivalent of legislative history, even while rejecting the use of extrinsic evidence of the drafting history so as to (in his mind) vary the meaning of the text.

99. See 2 Farrand, *supra* note 94, at 563 (Randolph, Sept. 10, 1787); *id.* at 631 (Randolph, Sept. 15, 1787); *id.* at 640 (Mason, Sept. 12, 1787) (objecting that “by their own construction” of the Necessary and Proper Clause, “Congress may grant monopolies in trade and commerce” and otherwise extend their own powers).

100. Joseph Story is often quoted in support of a textualist canon, as he asserted that “[n]othing but the text itself was adopted by the people.” *JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 389 (1833). Professor Powell thus characterizes Story’s approach as “text-bound interpretation,” in which the judges are charged with “squeezing meaning out of the Constitution’s laconic text.” H. Jefferson Powell, *Joseph Story’s Commentaries on the Constitution: A Belated Review*, 94 *YALE L.J.* 1285, 1307, 1309 (1985). Powell reads Story as objecting to “intentionalism” on the evidentiary ground that there could be no certainty that the correct intent could be found, but also on the idea that the idea of an intent other than what is found in the text was “vacuous.” *Id.* at 1306.

In my view, Powell has overstated the case. Asserting that the first rule of construction was to construe “according to the sense of the terms, and the intention of the parties,” Story concluded that constitutional provisions should be interpreted by reference to “the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law.”

remains true, of course, that there has been a debate historically over the appropriateness of reliance on the constitutional equivalent of internal legislative history, as well as modern debate over which view predominated at particular times in our historical practice. The section which follows will attempt to assess these debates with the help of the insights provided by the work of Professor Dickerson.

IV. THE DEBATE OVER RELIANCE ON "LEGISLATIVE HISTORY" IN CONSTITUTIONAL INTERPRETATION

However one assesses the usefulness of the distinction between the "objective" and "subjective" approaches to "intent," or whether the objective approach is appropriately characterized as a textualist canon, Dickerson's work underscores that the focus on the legislative instrument reinforces rather than undermines the principle of legislative supremacy (or popular sovereignty). As noted above, modern commentators frequently write as though common law's "objective" approach, with its textual focus, yields a reader-based orientation that facilitates construction according to the needs and values of society at the time the constitution or statute is being construed.¹⁰¹ Dickerson,

STORY, *supra*, at 383. Story also assured that the "reason and spirit of the law," which he equated with "the causes which led to its enactment," are often "the best exponents of the words, and limit their application." *Id.* at 384. While Story clearly was anxious that the text receive its due, these statements reflect that he saw the interpretive task as one of determining the intended meaning of the text rather than the one that was congenial to the policy preferences of the interpreter. Story would never have accepted the characterization of the interpreter's task as that of "squeezing meaning" out of a text, as though the legitimate product of the enterprise was as much the fruit of the act of interpretation as it was of the decision embodied in the text.

Story did warn against undue reliance on "contemporary interpretation," but his critique focused on inappropriate reliance on dubious evidence of informal expressions of intent to detract from "the fair meaning of the words of the text." *Id.* at 390 n.1; *see id.* at 390-92. In the very sections relied upon by Powell, Story himself acknowledges valid uses of "contemporary interpretation," *id.* at 388, 390, which suggests that he did not see the idea of legislative intention as "vacuous." Story's pervasive concern was that extrinsic evidence not be used to "abrogate the text" or "fritter away its obvious sense," so that the words are "bent and broken by the 'probable meaning' of persons." *Id.* at 390 & n.1. While Story found the sort of reliance on the original materials employed by Jefferson and others to be unacceptable, his own volumes are filled with references to THE FEDERALIST PAPERS as aids to his own construction of the Constitution. *See Powell, supra*, at 1310 n.165 (acknowledging that the most powerful influences on Story's constitutional views were THE FEDERALIST PAPERS and the writings of John Marshall); Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1311-13 (1990) (analyzing Story's treatment of the Ninth Amendment, which relies upon the historical background and purpose as set forth by Hamilton in THE FEDERALIST No. 84); *see also Rotunda, supra* note 26, at 512 n.27.

101. *See supra* notes 26-30 and accompanying text. Most recently, Professor Baade seems to juxtapose the intentionalism for which he finds little historical support with a competing model

by contrast, correctly viewed an appropriate emphasis on the legal instrument as a device for ensuring fidelity to original meaning. In response to the argument that the plain meaning rule of statutory construction undercuts the notion that interpreters seek the actual intent in order to do the will of the legislature, Dickerson contended that “the ‘plain meaning’ approach, however formulated, is at least partly a separation-of-powers device to remind judges of their prime responsibility to policy set by another branch of government.”¹⁰²

A. The Problem With Reliance on “Legislative History”

What Dickerson understood is that the elaborate search behind and beyond the statute is frequently engaged in to discover a way of avoiding the clear import of the statutory language because of the policy preferences of the “interpreter.” Opposition to reliance on legislative history to discover the “actual intent” of the legislature has often been the product of the abuses of manipulative judges who can always find a relevant intent to permit them to avoid the policy established by the legislature.¹⁰³ The central reason for opposing reliance on extrinsic evidence drawn from legislative history, just as in the parol evidence rule in the law of contracts, has always been the fear that the interpreting court would be led to vary the written instrument in favor of informal and nonauthoritative expressions of intent — all in derogation of the expressed will of the legislature.¹⁰⁴

that sees the founders as drafting a Constitution that would be “subject to mobile interpretation in the future.” Baade, *supra* note 18, at 1005. And, in turn, he suggests that his historical work might at least bear on whether the Supreme Court is justified in rejecting an “originalist” reading for the dynamic (or “mobile”) alternative. *Id.* at 1006. An apparent implication is that the discrediting of the intentionalism he criticizes as the method intended by the framers in favor of the textually oriented approach lends support to the “dynamic” view. *See, e.g., id.* at 1024 (“[p]ut bluntly, the framers of the Constitution . . . did not intend to bequeath their understanding of it to future generations in perpetuity”). Some doubt as to this conclusion as to Baade’s “original intent” remains, if only because Baade subsequently acknowledges that the history he reviews is less responsive to the attempt by some modern originalists to find the objective meaning of the constitutional language at the time that it was adopted. *Id.* at 1104-07; *see also id.* at 1024 (acknowledging that early approach to statutory interpretation would justify a jurisprudence of “original intent” to the extent that historical evidence “accurately reflects the collective intent of the ratifying conventions”; also insisting, however, that any such approach was viewed as an “auxiliary” method to be “used with caution.”)

102. DICKERSON, *supra* note 1, at 77.

103. For useful comment, see Landis, *supra* note 22, at 890-91.

104. Powell writes: “Political and legal scholars in both Britain and the American colonies viewed strict judicial adherence to the legislature’s language as a constitutional necessity, because the ‘known, fixed laws’ could be properly established or altered only by ‘the whole legislature,’ which spoke only through its enactments.” Powell, *supra* note 21, at 898, (quoting LAWRENCE LEDER, *LIBERTY AND AUTHORITY* 86-87 (1968)).

The dangers presented by an intentionalism that fails to give primacy to the text is well illustrated in the work of Raoul Berger. The difficulties in Berger's approach to constitutional interpretation have been developed elsewhere,¹⁰⁵ but a couple of examples may illustrate the problems. First, in a book-length treatment of the scope of the "exceptions clause" of Article III using his own "original intent" approach,¹⁰⁶ Berger clearly confused the meaning of the generally worded provision with particular contemplated applications of the provision as revealed by statements in the "legislative" history.¹⁰⁷ Berger simply failed to grasp that the intended meaning of a provision is not necessarily limited to its contemplated specific applications.¹⁰⁸ This approach to discovering binding "intent" reflects what has been described as the "pointer theory of meaning," which incorrectly assumes that we use words to describe specific things that we are thinking about rather than general ideas.¹⁰⁹ In practice, reliance on this assumption amounts to a form of strict construction that fails to implement the policy established by the statute or constitution in favor of giving effect only to the specific, known intentions (read specifically intended applications) of the adopters.¹¹⁰

105. McAfee, *Berger v. The Supreme Court*, *supra* note 2.

106. RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* (1969).

107. *Id.* at 285-97; see McAfee, *Berger v. The Supreme Court*, *supra* note 2, at 226-28, 244-46. Professor Richards has commented that "Berger's originalism is a kind of appeal to what I call Founders' denotations. He holds that the meaning of a constitutional provision is to be understood in terms of the things in the world to which the relevant Founders would have applied the term at the time the constitutional provision was adopted authoritatively." David A. J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1380 (1990). What many critics of originalism miss, however, is that it is possible to seek the original intentions of the framers and ratifiers, with or without reliance on legislative history, without committing the fallacy of equating originally intended meaning with specifically envisioned applications.

108. The point is well made specifically as to the exceptions clause in William Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 260 (1973).

109. For discussion, see DICKERSON, *supra* note 1, at 76-77; Kelley, *supra* note 4, at 604.

110. Professor Dickerson observes that the argument that we must read statutes in their current context, rather than original, frequently rests on the false assumption that the original context refers only to specific contemplated results rather than the general meaning of the text as understood in the light of the relevant linguistic, social, and historical setting. DICKERSON, *supra* note 1, at 125-31; see *id.* at 127-29 (joining criticism of decision interpreting a statute limiting the right to serve on a jury to eligible voters enacted prior to women's suffrage as not permitting women to serve even after being extended the right to vote; arguing, contra a critic of original context, that the court erred not in looking at context but in thinking that the legislative "intent" to exclude women from jury service prevailed over the clearly expressed intent to equate the conditions of jury duty with the qualifications for voting). A great deal of criticism of originalism in constitutional interpretation rests on this same fallacy.

The blinding light that careless use of legislative history can cast is also illustrated in Berger's initial conclusion that the Equal Protection Clause of the Fourteenth Amendment applied only to "statutes."¹¹¹ Berger's treatment of the provision had focused on the Black Codes and statements in legislative debate focusing on the evils of "class legislation," and he had therefore apparently taken these historical instances of denial of basic rights as the exclusive targets of the provision. His focus on the legislative materials, however, prompted Berger to pay insufficient attention to the text, which prohibits a state from denying any person the equal protection of the "laws" — language that is clearly more inclusive than a state's legislative enactments. The best evidence we have, the text, indicates that Congress intended to secure *legal equality* in basic rights for classes of citizens who had been victimized by discrimination, not to prevent such victimization only by laws enacted by the legislature. As this case illustrates, undue focus on the words of legislative debate in search of "intent" can easily lead us away from implementing clearly expressed intent.¹¹²

B. The Appropriate Uses of Legislative History

Knowing the concerns that call into question some of the uses to which legislative history has been put may enable us to determine

111. BERGER, *supra* note 93, at 174-76. Berger subsequently reconsidered and recanted this view. Raoul Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 Wis. L. REV. 341, 356.

112. It may seem that Berger is being dealt with harshly, considering that he corrected this mistake when it was brought to his attention. See *supra* note 111. But this same inattention to the text and overemphasis on legislative history also prompted Berger to miss completely the central thrust of the Equal Protection Clause. Berger has continually taken the position that the clause was intended to limit the formal law of the state — i.e., statutes (as he said initially) and judge-made law; on the other hand, Berger has insisted that the mere failure or refusal to enforce nondiscriminatory laws, even if rooted in official policy or customary law, does not give rise to any claim. BERGER, *supra* note 93, at 183-92. For a brief critique, see McAfee, *Berger v. The Supreme Court*, *supra* note 2, at 252-53 (observing, among other things, that Berger's reading renders the Fourteenth Amendment more restricted in scope than the Civil Rights Act which he claims it was intended to codify).

Moreover, there is little room for doubt that the notion of *equal* protection of the laws emerged from the longstanding social contract idea that citizens should receive the "protection" of the laws. This right was centered on government's duty to give effect to the rights which individuals enter into civil society to secure, and it thus included the duty of the executive branch to enforce the protections of law for all citizens. See, e.g., David P. Currie, *The Constitution in the Supreme Court: Limitations on State Power 1865-67*, 51 U. CHI. L. REV. 329, 353-54 (1984). Just as with his mistaken focus on statutes, Berger's uncorrected error of limiting equal protection to discriminatory laws appears almost certainly to have been the result of taking the legislative debate statements that emphasized the problem of unequal legislation as stating the entire thrust of the provision.

whether there might be permissible uses of such history that do not compromise the text as the vehicle for communicating legislative intent. As my colleague, Patrick Kelley, has suggested, if we respect the primacy of the text while recognizing that the text must be read in a context that includes the occasion of its enactment, internal legislative history can properly be seen as a source of evidence of the historical occasion without being viewed itself as a part of the context of the statute.¹¹³ As he notes, this sort of reliance on legislative history becomes especially valuable to the extent that a subsequent legislative audience is especially unlikely to have a complete understanding of the historical occasion for the enactment.¹¹⁴

Professor Kelley's insight may be a key to understanding the debate early in the nation's history relating to the proper sources for construing the Constitution. When interpreters, however famous, sought to play a trump card for answering a specific question consisting of evidence of intent drawn from the secret proceedings in Philadelphia, they were met with strong objections based on either the reliability of the evidence or the appropriateness of relying on the secret intentions of the drafters.¹¹⁵ Even so, such opposition to reliance on the notes of the Convention did not prevent many interpreters from contending that extrinsic evidence of legislative intent might be resorted to "with

113. Kelley, *supra* note 4, at 601-02. As he notes, although Professor Dickerson disapproved of reliance on internal legislative history to prove the intent of the legislature, he cited *Heydon's Case* with approval and should not therefore in principle have been opposed to reliance on any fairly reliable evidence to establish its elements.

Similarly, Judge Gee is a modern exponent of the view that we should seek "the Constitution's intent" in "the text of the document itself" rather than by "looking for legislative history or scurrying after the framers' private motives." Gee, *supra* note 97, at 1339. But he, too, is looking for the original meaning. He, thus, acknowledges that we should read the Constitution to seek the intent of a hypothetical mind that we project backward from the text; and, moreover, this hypothetical mind should "be situated in a concrete political and cultural context" so that we understand the text as would its immediate audience. *Id.* at 1337. It seems likely that Judge Gee would also accept the possible relevance of legislative history materials to understanding the text in this "concrete political and cultural context."

114. Kelley, *supra* note 4, at 602. Professor Baade observes that even while the no-recourse rule dominated American statutory construction, an American Attorney General, Caleb Cushing, noticed a "perplexing inconsistency" in the traditional view. Baade, *supra* note 18, at 1033. If the traditional view permitted consultation of the "public history" to determine the purposes underlying the legislation, Cushing wondered why it was "that we are shut out from that field of inquiry, which may be the most suggestive of trains of thought or of facts resulting in the discovery of the truth." *Id.* (quoting *City of Georgetown*, 8 Op. Att'y Gen. 546, 560 (1856)).

115. See, e.g., Baade, *supra* note 18, at 1022 (discussing Elbridge Gerry's objection to Madison's reliance on the Convention decision on the power to incorporate based on the view that individual opinions did not express the views of the Convention); *id.* at 1018 (summarizing Albert Gallatin's speech opposing reliance on the unrevealed intentions of the Convention).

caution.”¹¹⁶ Indeed, although Madison came to oppose reliance on the Convention notes as authoritative of meaning, he clearly supported inquiry into the “evils and defects” to be cured by constitutional provisions and acknowledged that even the Convention notes might be used “as presumptive evidence of the general understanding at the time of the language used.”¹¹⁷

Indeed, as soon as one considers that the speeches and records of the state ratifying conventions are themselves a form of internal legislative history — representing the equivalent of the whole process of debate on the floor of a legislative chamber, including the proposing of amendments — it becomes evident that leading figures such as President Washington, Hamilton, Jefferson, Madison, Story, and Chief Justice Marshall all resorted to legislative history in construing the Constitution.¹¹⁸ In fact, published scholarship on thinking about constitutional interpretation early in the nation’s history is in general harmony that there was widespread support, if not a consensus, for the appropriateness of considering the reports of the state ratifying conventions in determining the originally intended meaning of the constitutional text.¹¹⁹

My own experience is that reliance on the constitutional equivalent of legislative history can be a useful aid to discovering the original meaning of constitutional provisions. Evidence drawn from such materials frequently provides us with the clearest record of the immediate

116. See 5 ANNALS OF CONG. 734 (1797) (statement by Albert Gallatin).

117. This language is drawn from a Madison letter which is excerpted at some length in Lofgren, *supra* note 79, at 110 (quoting Letter from Madison to M.L. Hurlbert, May 1830, in 9 THE WRITINGS OF JAMES MADISON 370, 371-72 (Gaillard Hunt ed., 1910)); see also *id.* at 109 (quoting Madison’s complaint against “ascribing to the intention of the Convention which formed the Constitution, an *undue ascendancy* in expounding it”) (emphasis added).

118. See, e.g., Baade, *supra* note 18, at 1019 (President Washington); *id.* at 1036 (Jefferson); *id.* at 1043 (Chief Justice Marshall); Powell, *supra* note 21, at 937-38 (Madison); *supra* note 98 (Hamilton); *supra* note 100 (Story).

119. See generally Baade, *supra* note 18, at 1024, 1062; Kay, *supra* note 23, at 275; Lofgren, *supra* note 79, at 79; Rotunda, *supra* note 26, at 511; Powell, *supra* note 21, 917-21; Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353-54 (1988). This evidence raises questions as to whether modern commentators have thought carefully enough about the appropriate analogies between statutory and constitutional interpretation. Thus both Professors Powell and Baade continually write as though this evidence is consistent with their own historical conclusions that the founders were generally committed to the common law method, including the prohibition against reliance on legislative history. See, e.g., *supra* note 76 and accompanying text; Baade, *supra* note 18, at 1005, 1033-34, 1038, 1041-42, 1048, 1104, 1106-07; Powell, *supra* note 21, at 919 (suggesting that reliance on state ratification materials in congressional debate was only “mildly innovative” despite contemporaneous claims that it was “a flagrant violation” of common law canons).

occasion for the constitutional provision or amendment, and, in addition, supplies us with powerful confirming evidence of the conclusions that also seem most plausible from a review of the general and immediate historical background. In a legal community that seems better at perceiving grounds for doubt than at finding reasonable grounds for answers, such confirming evidence is sometimes critical if for no other reason than to reach the skeptical — though, admittedly, some are beyond reach. Beyond the conviction inspired by my reading and teaching of constitutional law and previous scholarly endeavors,¹²⁰ my own belief that the historical record can help us to find answers has been strongly confirmed by my review of the “legislative” materials associated with the issue whether the generally worded provisions of the Bill of Rights were intended to be applicable to the governments of the states.

C. The Bill of Rights Revisited — A Test Case

As shown above,¹²¹ Chief Justice Marshall facilitated his treatment of the issue by reviewing the general historical background and immediate context of the consideration and ratification of the Bill of Rights. Marshall's treatment led him to the fairly compelling conclusion that Article I, Sections 9 and 10 provided a pattern that would have been followed had the framers intended these provisions to apply to the states. At least one modern scholar, William W. Crosskey, insists that Justice Marshall informally amended the Constitution by refusing to follow the plain import of generally worded constitutional text.¹²² According to Crosskey, general words can only be given a limiting construction where there is “clear, strong evidence of a purpose narrower than that which the words to be restrained expressed.”¹²³ In

120. See McAfee, *supra* note 100; McAfee, *Constitutional Interpretation*, *supra* note 2, at 281-89 (explicating Fourteenth Amendment Privileges or Immunities Clause).

121. See *supra* notes 62-76 and accompanying text.

122. See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1049-82 (1953). Difficult as it may sound, Crosskey managed in these thirty-three pages to illustrate the worst errors that can be made in undue reliance on text read out of context and ill-conceived manipulation of the most dubious evidence from the legislative history of the Bill of Rights.

123. *Id.* at 1064. This sort of reliance on an overwhelming presumption in favor of a preferred reading of a text, prior to placing that text in its immediate historical context, continues even among sophisticated interpreters today. Thus some claim that the text of the Ninth Amendment provides a clear warrant for modern fundamental rights adjudication, and attempt to shift the burden of proof to those who read it differently. See, e.g., Charles L. Black, Jr., “One Nation Indivisible”: *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 29 (1991)

this case, given the specific references to the national government in the First and Seventh Amendments, Crosskey argued that only resorting "to the theory of blundering draftsmanship" could explain away the purposeful inclusion of general language that would limit the power of all levels of government.¹²⁴

Adding to this basic textual analysis, Crosskey contended that the substance of the amendments, speaking to things which were deemed "inherently evil," belied an attribution to the framers of an intent "to create sole and exclusive state powers to do the things forbidden."¹²⁵ To Crosskey it was not central that the pervasive clamor for a bill of rights was stated in terms of the fears relating to the extent

(suggesting that it would take "an awful lot of brightly clear evidence to show" that the Declaration of Independence and the Ninth Amendment, read together, were intended to do something other than formally committing the nation to human rights enforceable against both the national government and the states — "if indeed that [intent] matters"); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 351-52 (1981) (book review) (claiming it would take "extraordinarily clear evidence of a different intent to overcome constitutional language that so clearly proclaims the existence of unenumerated rights").

But the Ninth Amendment rights "retained by the people" can easily be read as a reference to the rights retained by the people when they granted enumerated powers to the national government. See McAfee, *Social Contract Theory*, *supra* note 9, at 268-69. In fact, the meaning that is so plain to modern interpreters is anachronistic and is the fruit of acontextual reliance on Constitutional language. McAfee, *supra* note 100, at 1238-48, 1284-87; see also *infra* note 133.

124. CROSSKEY, *supra* note 122, at 1058. Crosskey's argument, that the framers must be taken as blunderers or as extending the Bill of Rights to the states, is obviously overblown. There is an immediately apparent theory that plausibly explains why the framers did not specify that these limitations applied only to the national government — they tacitly assumed that the legislative audience (the American people) understood that the entire project was about limiting the powers of the national government.

125. *Id.* at 1059. Crosskey offered no explanation, of course, as to why a failure to include specific limitations against federal power would have been viewed as an affirmative grant of such powers to the states; under the doctrine animating the framers, any such powers would have been reserved to the people of the states, not their governments, except to the extent that the people had granted such powers to their state governments. A decision against extending a limitation to include state governments would flow from a desire to keep such decisions within the states, for the people of the several states, perhaps partly out of fear of granting power to the national government, and not from an inclination to grant illegitimate power to the state governments.

Moreover, while purporting to rely on a textualist canon of interpretation, Crosskey answered the objection that the First Amendment also addressed inherent evils by pointing to state establishments of religion and speculating that the states wanted to retain broad regulatory power over speech, press, and assembly rights because of their memories of the agitations relating to Shays' Rebellion and similar "disturbances." *Id.* at 1060. He offered this despite the fact that the ratification-era demands for a federal bill of rights most often stated the insistence that the people were entitled to the same rights against the new general government that they had retained as against their state governments.

of the powers granted to the government created by the Constitution,¹²⁶ or that the demand for a bill of rights was frequently couched in terms of the need to provide security for the rights of the people *and the states*.¹²⁷ It hardly mattered that the Federalists defended the omission of a bill of rights in part on the ground that most states had their own bills of rights and, even more centrally, from the argument that the Constitution granted to the new government only limited power to affect the basic interests of the people and thus secured their rights as a reservation from the powers granted the new government.¹²⁸ The crucial thing was the "plain text" of the amendments.

126. See McAfee, *supra* note 100, at 1227-37. Indeed, even though the prefix appended to the proposed amendments by Congress referred expressly to the desire of the state ratifying conventions "to prevent misconstruction or abuse of [the Constitution's] powers" and thereby generate "public confidence in the Government," CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 3 (Helen E. Veit et al., eds. 1991) [hereinafter CREATING THE BILL OF RIGHTS], Crosskey ignores that the fears of misconstruction and abuse that led to the Bill of Rights had been exclusively directed at the grants of power to the national government. Instead he insisted, based upon Article I and the Tenth Amendment, that "the Government" was in fact "a scheme of 'Government' through state 'Powers' as well as national 'Powers.'" CROSSKEY, *supra* note 122, at 1065 (emphasis in original). So the "government" to be limited was the "compound government" created by the Constitution. *Id.*

Clearly, though, contrary to Crosskey's formulation, the federal Constitution had been conceived as *granting* powers only to the national government it created, while *reserving* powers to the people and the states. See CREATING THE BILL OF RIGHTS, *supra*, at 22 (New York state proposal for amendment providing that powers not delegated remain "to the People of the several States, or to their respective State Governments to whom they may have granted the same"). In context there is every reason to think that "the government" referred to in the congressional prefix is the national government, and this view receives some confirmation inasmuch as this sort of usage was employed during the congressional debates over the proposed bill of rights. See, e.g., CREATING THE BILL OF RIGHTS, *supra*, at 82 (James Madison, June 8, 1789) (summarizing argument that a bill of rights is unnecessary under the proposed constitution because it is a "bill of powers, the great residuum being the rights of the people"; listing rights would be to act as if "the residuum was thrown into the hands of *the government*"); *id.* at 182 (Elbridge Gerry, Aug. 17, 1789) (emphasis added).

The pernicious effect of Crosskey's over-reliance on an overwhelming presumption he gives to the asserted "plain meaning" of the generally worded provisions of the Bill of Rights shows up even here. Crosskey betrays his own doubts of this strained reading of the congressional prefix when he asserts that in any event "it is difficult to see how the preamble to the amendments could be taken as *clear* evidence of a purpose . . . to impose further restrictions on the nation alone." CROSSKEY, *supra* note 122, at 1065 (emphasis in original). Crosskey means that it cannot convince the stubborn and bull-headed.

127. E.g., 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 210, 211 (Merrill Jensen ed., 1976) (An Officer of the Late Continental Army, Nov. 6, 1787) (complaining that "the liberties of the states and of the people are not secured by a bill or *Declaration of Rights*"); see McAfee, *supra* note 100, at 1241-45 (treating the states-oriented nature of many of the concerns of Antifederalist opponents of Constitution who demanded a bill of rights); *infra* note 133 (statement by Hardin Burnley).

128. See McAfee, *supra* note 100, at 1230-31, 1243, 1246, 1250-51.

Turning to the legislative history, Crosskey might have found powerful confirming evidence of Justice Marshall's general contextual analysis. Thus, just as we might expect in light of Marshall's structural analysis of Article I, Sections 9 and 10, Madison's original resolution for a bill of rights, which he proposed to insert into relevant sections of the Constitution, called for virtually all of the provisions now found in the first nine amendments to be included in Article I, Section 9, as limitations against the national government.¹²⁹ Virtually all of these amendments had been proposed by various state ratifying conventions and were, in turn, drawn from leading state declarations of rights.¹³⁰ In addition, Madison made his own original contribution by proposing to insert into Article I, Section 10, prohibitions on state violations of "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."¹³¹

In presenting these amendments to Congress, Madison answered the objection that the amendments were not essential because the national government would be one of enumerated powers.¹³² In addition, he explained that he had also made provision for confronting the most serious objection to a bill of rights, namely, the inference that the enumerated "exceptions to the grant of power" might be taken to be exclusive such that the rights not included — those secured as a "residuum" from granted powers — would be viewed as assigned to the "general government."¹³³ These arguments are, of course,

129. CREATING THE BILL OF RIGHTS, *supra* note 126, at 12-13; *see id.* at 30-31. (House Committee Report, July 28, 1789, which tracks Madison's original resolution and adds the version of current Seventh Amendment to Article I, Section 9).

130. *See* McAfee, *supra* note 100, at 1280 n.244; Donald S. Lutz, *The States And The U.S. Bill of Rights*, 16 S. ILL. U. L.J. 253-256 (1992).

131. CREATING THE BILL OF RIGHTS, *supra* note 126, at 13. It is of obvious significance that Madison not only separated the proposed limitations on the federal and state governments, but also that the limitations on the states in favor of freedom of conscience and press are stated in virtually identical terms to the limits proposed for the national government. *Id.* at 12-13. And Madison's initial proposals for what became provisions within the First Amendment were not framed merely as limitations on the powers of Congress. *Id.* at 12. Moreover, when a proposal setting forth the right to jury trial in criminal cases was included as the proposed Ninth Amendment in the House version of the Amendments, a virtually identical provision limiting the states was included in the proposed Fourteenth Amendment. *Id.* at 39, 41.

132. *Id.* at 82.

133. *Id.* at 83; *see* McAfee, *Social Contract Theory*, *supra* note 9, at 269 & n.5. For an explication of Madison's treatment of this objection, and its bearing on the Ninth Amendment, *see* McAfee, *supra* note 100, at 1284-87. Consistent with his general theory of the significance of the lack of restrictive language in most of the provisions of the Bill of Rights, Crosskey argues that the Ninth Amendment was intended to be applied to the states. CROSSKEY, *supra* note 122, at 1078 (arguing from general text and view that rights could not be "retained" by

completely incoherent except against the backdrop of the terms of the ratification debates to which Madison specifically referred, which presumed that the debate over a bill of rights concerned limiting the national government.¹³⁴ The same arguments against a bill of rights were repeated during the congressional debates considering the amendments.¹³⁵

In his speech, Madison forthrightly explained that he desired to "extend" the protection offered to some crucial rights by providing for their protection even as against state governments, arguing that "it is proper that every government should be disarmed of powers which trench upon those particular rights."¹³⁶ It is quite clear historically that Madison held a special concern about the potential for abuses against individual and minority rights by majoritarian state

the people unless "they were free of the authority, not only of the national government, but of the state governments as well"); accord Black, *supra* note 123, at 26 (since Ninth Amendment text "uses 'certain rights' enumerated 'in the Constitution' as its base of reference, and 'certain rights' against the states *are* enumerated 'in the Constitution,'" for constitutional textualists "the application of [the Ninth Amendment] to the states ought to be clear"). Strangely, the largest number of commentators who find that the amendment quite clearly secures fundamental rights do not find it at all clear that it secures them against the states. In fact, the Ninth Amendment supplies a remarkably clear example of a generally worded provision which the context reveals to be restricted in its scope to limiting the national government. Indeed, as I have shown elsewhere, the Ninth Amendment was drafted to prevent an inference of enlarged national powers in derogation of the people's retained rights from the enumeration of rights in the Constitution. McAfee, *supra* note 100, at 1277-93. As Madison's language quoted in text reflects, the text was drafted to avoid an inference of *national* power, and (as noted *supra* note 129) Madison proposed that the amendment be inserted in Article I, Section 9.

During the 1789 debate over ratification of the proposed bill of rights in Virginia, it was objected that the amendment should have been written in terms of avoiding an inference of constructive power in Congress, consistent with the amendment's Virginia prototype. In response, Hardin Burnley, a member of the Virginia assembly, assumed that all agreed as to the end sought, but contended that the current wording achieved it:

[B]y preventing an extension of power in that body from which danger is apprehended safety will be insured if its [Congress'] powers are not too extensive already, and so by protecting the rights of the people & of the States, an improper extension of power will be prevented & safety made equally certain.

2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1188* (1971) (letter from Hardin Burnley to Madison, Nov. 28, 1789). Burnley was clearly perceiving the "rights of the people and the States" (not *against* the states) as those secured by the limited powers scheme, and the other rights retained would be sufficient if Congress' powers "are not too extensive already" (i.e., if the powers set forth in Article I are not unduly broad or ill-defined). See McAfee, *supra* note 100, at 1287-93 (reviewing evidence related to Virginia ratification debate over a bill of rights which reflected understanding that the Ninth Amendment was drafted to avoid an inference in favor of congressional power in derogation of rights retained by the limited powers scheme of the Constitution).

134. CREATING THE BILL OF RIGHTS, *supra* note 126, at 83.

135. *E.g.*, *id.* at 86 (Rep. James Jackson, June 8, 1789).

136. *Id.* at 85.

legislatures; and he was forthcoming here that these proposals grew out of his own concerns, for which he argued, rather than from the history leading up to the balance of the proposed amendments.¹³⁷ It is equally clear that these proposals were as controversial as they were novel. On August 17, 1789, Thomas Tudor Tucker moved to strike them because they were "an interference with the Constitution of the several States," adding that many thought the states were interfered with too much already.¹³⁸ Although his motion was rejected, the Senate refused to agree to what had become, ironically, the fourteenth proposed amendment, and Madison's attempt to add to the limits imposed on the states failed.¹³⁹

Keeping the plain meaning of the text at the forefront, what was significant to Professor Crosskey was not that Madison followed precisely the pattern of Article I, Sections 9 and 10 in setting forth generally worded limitations on the national government and specific limitations on the states, but that these provisions were eventually placed at the end of the Constitution and the specific limitations on the states eliminated.¹⁴⁰ Nor was it significant that there is no evidence that the decision to move the amendments to the end of the document was viewed by any one as having any substantive significance as to the meaning or purpose of any of the specific provisions.¹⁴¹ Finally, for Crosskey the Senate's rejection of the few proposed restrictions on the states that Madison ventured to offer is significant only because that decision destroyed "the sole surviving basis in the amendments, as they then existed, for inferring an intended application of their various literally general prohibitions, to the nation only."¹⁴² In short,

137. Madison's special concern with state power, which had prompted him to promote a national veto over state legislation at the Convention in Philadelphia, is thoughtfully developed in Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 252-57 (1990).

138. CREATING THE BILL OF RIGHTS, *supra* note 126, at 181, 188-89.

139. *Id.* at 41 n.19.

140. CROSSKEY, *supra* note 122, at 1067. Crosskey even acknowledges that "if the amendments had been made as Madison proposed them, the Supreme Court's decision in *Barron v. Baltimore* would have been correct." *Id.*

141. Indeed, the evidence suggests the opposite. See, e.g., CREATING THE BILL OF RIGHTS, *supra* note 126, at 108-18 (Aug. 15, 1789) (containing discussion between Madison and Roger Sherman over the propriety of separate amendments versus incorporating amendments in the original text).

142. CROSSKEY, *supra* note 122, at 1070. Crosskey seeks to bolster this reading of the significance of the September 7 vote with the fact that, of the specifically worded limitations on the states that were rejected, only the provisions relating to speech, press, and assembly were realigned to specifically only limit Congress whereas the provision for jury trials in criminal cases was left as a generally worded limitation; the apparent implication, for Crosskey, is that the intent was to grant the states leeway on freedom of speech, press, and assembly (to prevent

rather than following the natural inferences suggested by the relevant texts and their drafting history, we are to presume that members of the first Congress paid scrupulous attention to the nuances of textual change and would have scurried to avoid the implications of the plain meaning rule had they so intended.

For those with minds disposed to read constitutional text in a relevant context, including the evidence from legislative history that sheds a confirming light, the interpretation found in *Barron v. Mayor of Baltimore*¹⁴³ appears to be virtually indisputable. And if the interpreter is left with any doubts after reading Justice Marshall's persuasive explication of the Bill of Rights in its historical setting, the legislative history provides overwhelming evidence that his approach was well-founded. Only a mind organized like Crosskey's, wielding a textual presumption that blinds one to powerful cues supplied by the historical context, would find the extrinsic evidence insufficient to resolve the contextual ambiguity presented by the wording of the Bill of Rights.¹⁴⁴ To adopt a favorite quotation from Justice Oliver Wendell Holmes, Jr., Crosskey is thus like the proverbial court that said to the legislature: "We see what you are driving at, but you have not said it [sufficiently clearly to overcome what we take to be the plain meaning], and therefore we shall go on as before."¹⁴⁵ Modern constitutional "textualists" who reject the obligation to read the text according to its meaning in its original context wind up saying much the same thing.¹⁴⁶

future Shay's Rebellions) while securing the other rights against the states. *Id.* at 1070-73. But the wording of the First Amendment is plausibly explained as reflecting the federalism concerns that impacted on the drafting, particularly as to the Establishment Clause, without speculating as to a unique interest in granting states leeway to suppress political agitation.

143. 32 U.S. (7 Pet.) 243 (1833).

144. As Henry Hart once observed in another connection, "Professor Crosskey is a devotee of that technique of interpretation which reaches its apogee of persuasiveness in the triumphant question, 'If that's what they meant, why didn't they say so?'" Henry M. Hart Jr., *Professor Crosskey and Judicial Review*, 67 HARV. L. REV. 1456, 1462 (1954) (book review).

145. 163 F. 30, 32 (1st Cir. 1908) (criticizing such an attitude toward interpretation of statutes). Dickerson offers that when the plain meaning rule is "used to read ineptly expressed language out of its proper context, in violation of established principles of meaning and communication," it ceases to be a way of directing the court to pay respect to the language of the statute and becomes "an impediment to interpretation." DICKERSON, *supra* note 1, at 229.

146. Surely this is precisely what Professor Black is saying when he demands, in 1991, "clear evidence" supporting a conflicting reading of the Ninth Amendment and asserts that he has "never seen such evidence of the requisite clarity and overpowering weight." Black, *supra* note 123, at 29. His openness to "seeing" such evidence is reflected, however, in the quip that immediately follows this claim: "But then those who believe in astrology always know more about astrology than do those who do not believe in astrology." *Id.* If Professor Black (currently

V. BEYOND THE DEBATE OVER RECOURSE TO LEGISLATIVE HISTORY

However one resolves the serious debate over the uses and abuses of legislative history, it is important, finally, to be clear about what is not implicated in such a debate. If the work of scholars setting forth the historical evidence against "intentionalism" establish anything, it is that the overriding issue of all the debates over constitutional interpretation early in the nation's history concerned the problem of how best to keep faith with the decisions made when the Constitution was drafted and ratified. In all the discussions and debates reviewed there is not the suggestion that the Constitution is to be construed according to the policy preferences of the interpreters or according to changing interests of society so long as the language can bear new and evolving constructions.¹⁴⁷ Indeed, the question was always fidelity versus interpretive license, and the problem defined in terms of how to promote the former and prevent the latter.

To illustrate, if there is room for debate as to whether James Madison is properly characterized as an "intentionalist" (or, assuming he was, in precisely what sense he was),¹⁴⁸ there can be no debate that Madison believed that the Constitution should be construed as having a fixed meaning according to the sense it had when it was adopted, rather than from the vantage point of the time when it was being interpreted. Madison could well have been Reed Dickerson when he wrote that "[i]f the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and

affiliated with Columbia University Law School) had eyes to see it, such evidence has been provided in a nearby source. McAfee, *supra* note 100 (published in 1990); *see supra* note 133. Moreover, nearly every leading scholar on the Ninth Amendment has rejected Black's idea that it applies against the states, a fact which itself raises questions as to the deep skepticism about original intent expressed by scholars like Professor Black.

147. It is sometimes suggested that Chief Justice Marshall's argument that the need for an adaptable national government, and his reminder that "it is a *constitution* we are expounding," *McCulloch*, 17 U.S. (4 Wheat.) at 407, is to the contrary. But Marshall himself insisted that he was seeking the original meaning of the Constitution, indeed the intent of the framers (whatever precisely he intended by that language), and expressed outrage at the contemporary suggestion that his opinion granted Congress a blank check. *See* Rotunda, *supra* note 26, at 512 & n.27, 513 & n.32; John Marshall, *supra* note 86, at 19-20 (describing Marshall's expression of outrage, and expressing his own belief that "Marshall's outrage was real").

148. *Compare* Powell, *supra* note 21, at 935-41 (viewing Madison as essentially embracing common law view that looked primarily, if not exclusively to the text, and emphasizing his commitment to the role of public understanding and precedent) *with* Lofgren, *supra* note 79 (treating Madison as one committed to the original meaning of the Constitution who would look to evidence of the intent of the ratifiers while for the most part treating the Philadelphia debates as nonauthoritative but sometimes useful).

attributes of the Government must partake of the changes to which the words and phrases of all living language are constantly subject."¹⁴⁹ For Madison it was clear that if the Constitution was not construed according to its original meaning, "there can be no security for a consistent and stable, more than for a faithful exercise of its powers."¹⁵⁰

In this area, Madison clearly stated the standard view. As an example of the anti-interpretive biases that influenced the founding era, Professor Powell quotes Thomas Jefferson's famous statement: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."¹⁵¹ Yet it seems apparent that as we increasingly embrace the view that the founders intended a "mobile" Constitution, against the overwhelming evidence that they did not,¹⁵² we have so rendered the Constitution a blank paper by construction that thoughtful commentators are led to consider whether "the Constitution" continues to consist of the document ratified in 1789 together with its duly-ratified amendments.¹⁵³ That the founding generation would be astounded by these developments should at least prompt us to consider whether their conception of constitutionalism contains a value that we ought not lightly discard. If we

149. Letter from James Madison to Henry Lee (June 25, 1824), *quoted in* Lofgren, *supra* note 79, at 105 n.101. *Compare* DICKERSON, *supra* note 1, at 126 (raising hypothetical question whether if the word "President" came to have the meaning now carried by the word "Commission," "[w]ould such a semantic development change the form of the federal government?").

150. Letter from James Madison to Henry Lee (June 25, 1824), *quoted in* Lofgren, *supra* note 79, at 105 n.101. For several similar, and equally powerful, statements by Madison that the constitutional meaning sought for is the meaning of the instrument at the time of its adoption, see Lofgren, *supra* note 79, at 105-07. For a fairly complete modern treatment of the centrality of the idea that we should read statutes in their original, rather than current, context, see DICKERSON, *supra* note 1, at 125-30.

151. Powell, *supra* note 21, at 893 n.40 (quoting Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *reprinted in* THE POLITICAL WRITINGS OF THOMAS JEFFERSON 144 (Edward Dumbauld ed. 1955)); *cf.* Gee, *supra* note 97, at 1339 (contending that "[o]riginal intent is, in fact, the only game in town, and those who seek another inevitably wind up excusing acts of free judging").

152. *See, e.g.*, Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989). Hamburger carefully documents what we might have supposed were our predilections not set against it — namely, that the framers were animated by a desire to establish fixed limits in law, not to create a "mobile" Constitution, just as Justice Marshall suggested in defending judicial review in *Marbury*.

153. Kay, *supra* note 23, at 1190. Indeed, some commentators herald the recognition that constitutional practice is no longer tied to the text of the Constitution understood as an historical document. *E.g.*, Brest, *supra* note 13, at 234 (analogizing relation between text and modern constitutional adjudication to "having a remote ancestor who came over on the Mayflower"); *cf.* Erwin Chemerinsky, *The Constitution is not "Hard Law": The Bork Rejection and the Future of Constitutional Jurisprudence*, 6 CONST. COMM. 29 (1989).

insist upon the right to make the Constitution “ours,” to make its text serve contemporary needs even if the proffered construction would alter the meaning of the text read in its original context, we gain flexibility and lessen the risk that the Constitution will come to be perceived as obsolete. But what we lose is too easy to miss. As Richard S. Kay has written:

That flexibility has a certain attraction, and it is, indeed, one of the principle arguments for a more or less unfettered judicial role. Still, it undermines what was and continues to be regarded as a central value of constitutional government — the capacity to fix, relatively permanently, the boundaries of permissive government action. Only such a permanent demarcation makes possible the exploitation of personal liberty, free of the ever-present threat of official intrusion that accompanies the insatiable appetite for power. Such security is the special contribution of the rule of law.¹⁵⁴

It has been suggested that the shift toward greater reliance on extrinsic evidence of intent in American statutory interpretation resulted in part as carryover from the tendency of courts to examine such evidence in the context of constitutional interpretation.¹⁵⁵ That sort of influence on statutory law from our constitutional practice would not be likely to end in the nineteenth century. In the long run, the more we see our written fundamental law as subject to our present-oriented interpretation, the more we will tend to undervalue the importance of the power to establish fixed rules in other realms as well, including the world of statutes.¹⁵⁶ As it is, the argument for a “dynamic” approach to statutory interpretation has been around for years; the success of nonoriginalism in the constitutional arena could only encourage the push for judicial discretion across the board. In this context, we might ponder the words of Reed Dickerson:

To the [scholars] who believe that it is more wholesome to meet the needs of the future than to honor the dead past, we may reply that, because legislation is almost always pointed to the future, intended future results cannot be assured unless the historical event that an

154. Kay, *supra* note 19, at 1197-98.

155. Baade, *supra* note 18, at 1062.

156. The ascendance within the academy of nonoriginalist theories of constitutional interpretation have probably contributed to the climate in which it becomes possible to suggest that courts might choose not to be bound by purportedly outdated statutes. Compare GUIDO CELABRES, A COMMON LAW FOR THE AGE OF STATUTES (1982) (suggesting such a possibility) with Archibald Cox, Book Review, 70 CAL. L. REV. 1463 (1982) (critique of such a view of judicial role).

enactment immediately becomes is later honored by the courts. This means honoring the legislative past. To do otherwise would substitute the courts for the legislature in the lawmaking process.¹⁵⁷

157. DICKERSON, *supra* note 1, at 130. It is also true, of course, that even after the battle for originalism is won, there will remain difficult issues pertaining to the application of constitutional provisions which require judicial creativity even when read in their original context. I am well aware that, for some, the defense of originalism only gives rise to two cheers because it is supposed that we immediately discover that, even read in their original context, constitutional provisions offer little restraint to interpreters. Such issues are worthy of a complete and serious attention, but they will require a separate treatment.

For my own part, I am persuaded that courts should find adequate constraints on interpretive power, notwithstanding that text and history may not provide all the specific answers that some would want, if they hold on to the same general interpretive attitude that originalism enjoins even when moving beyond the inquiry into cognitive meaning to the creative tasks of assigning and supplementing meaning. For my own preliminary attempts to grapple with these issues, relying in part on Professor Dickerson's valuable treatment of analogous questions in the field of statutory interpretation, see McAfee, *Constitutional Interpretation*, *supra* note 2, at 293-95; see also Dickerson, *supra* note 3, at 792-95; Kelley, *supra* note 4, at 604-05.

